90-1626

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,

Petitioners

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

1. Whether subject matter jurisdiction exists for violations which occurred in the past under a penal statute written by Congress in "present tense" language.

2. Whether a penal statute, imposing civil money penalties under 12 USC 1818(i)(2) and 12 U.S.C. 93(b) on bank directors for past acts, requires a strict statutory construction of the words used in the statute.

3. Whether statutory language written in a penal statute which uses past tense language in a section (a) and present tense language in the next section (b) of the same statute can be construed to have both sections apply to past acts.

4. Whether a subsequent statute, which is **in pari materia** to the original statute, bars liability for past acts of these directors, when the original statute is written in "present tense" language but with no specific reference to liability for past acts, and the subsequent statute which is **in pari materia** to the original statute retains the same "present tense" language but adds liability for past acts which would exclude liability on the bank directors at issue.

5. Whether a "Notice of Assessment of Civil Money Penalties" containing specified alleged violations constitutes a Procedural Due Process Notice, or is a "gratuitous" document rendered unnecessary by the execution of a Cease and Desist Order reciting the terms of an agreement between a bank and its regulatory body.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2, 3
STATEMENT OF THE CASE	3
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	3
Whether civil money penalties under 12 USC 93(b) and 12 USC 1818(i)(2)(i) can be imposed for wholly past acts.	4
1. The statutory language is clear; penal statutes are to be strictly construed.	7
2. Conclusory finding of ambiguity; misquote of Supreme Court's opinion.	14
3. Pervasive use of the present tense.	16

Page

4. This decision requires one to ignore words in the legislative history. 17

5. Amended statute, in pari materia, mandates statutory construction of prior act as barring liability for past acts. 20

6. The "Notice of Assessment" is a document mandated by procedural due process; it is not gratuitous. 25

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED. 27

I. Violates U.S. Supreme Court precedent; statutory language is unambiguous; misquotes U.S. Supreme Court; potential of "avalanche of errors" in reliance on misquote. 27

II. Contrary to rules of statutory construction; penal statute; constitutes judicial re-writing of statutory words. 28

III. Violates binding 7th Circuit precedent; violates rule of statutory construction when sec. A is in past tense, and sec. B is in present tense. 28

IV. Requires Court to ignore terms contained in the legislative history. 29

Page

V. Violates Rules of statutory construction for statutes in pari materia. 29

VI. Violates procedural due process rights of bank directors. 29

CONCLUSION 30

TABLE OF AUTHORITIES

	Page
12 USC 93 (a)	14,
12 USC 93 (b)	3, 6, 7, 17, 27
12 USC 1818 (i)(2)(i)	2, 3, 4, 6, 7, 17, 27
12 USC 1818 (i)(2)(iii)	3
12 USC 1818 (i)(2)(iv)	4
U.S. Senate Report 95-323, 1st Sess. (1977).	18
Cases:	
Abercrombie, et al. v. Office of the Comptroller of the Currency, (Decision below, **Abercrombie II**) 920 F2d 1351 (7th Cir., 1990).	2, 4, 6, 15, 18, 21, 25, 27
Abercrombie, et al. v. Office of the Comptroller of the Currency, (**Abercrombie I**), 833 F2d 672 (7th Cir., 1987).	16, 17, 25
Alexander v. Alexandria, 5 Cranch 1, 3 L.Ed. 19 (1809).	22
Cutten v. Wallace, 80 F2d 140 (1935).	9, 10, 12, 15, 28

Page

Garner v. Louisiana, 368 US 157, 7 L Ed2d 207, 82 S Ct 248 (1961). 24

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376, at p. 381. (1987). 7, 8, 12, 13, 16, 17, 26, 28

Tiffany v. The National Bank of the State of Missouri, 18 Wall 409, 85 US 862 (1873). 8

United States v. Freeman, 3 How 556, 11 L.Ed 724 (1845). 23

United States v. Montgomery Ward & Co., 150 F2d 369 (7th Cir.). 23

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS Manley Abercrombie, Robert Q. Calloway, Richard F. Eckel, Donald E. Hedrick, and E. Weston Sloan petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

A decision was rendered by the United States Court of Appeals for the Seventh

Circuit on December 26, 1990, and after timely filing of petitioner's Petition for Rehearing with Suggestion of En Banc, the same Court denied the Rehearing and Rehearing En Banc on January 23, 1991. The decision of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A. The decision is reported in 920 F2d 1351.

JURISDICTION

The decision of the Court of Appeals was decided on December 26, 1990. Petitioners timely filed their Petition for Rehearing with Suggestion of En Banc, and the Petition for Rehearing and of the Rehearing En Banc was denied on January 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 1818 (i)(2)(i) provides:

Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued pursuant to subsection (b) or (c) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: Provided, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

12 USC 93(b) contains identical language.

Statement of the Case

Federal jurisdiction is conferred pursuant to 12 USC 1818(i)(2)(iii) which provides for an initial administrative hearing, with the right to petition for review by the U.S. Court of Appeals

pursuant to 12 USC 1818(i)(2)(iv). As stated by the Court below, "[T]he basic question before us is whether the Comptroller appropriately determined that civil money penalties could be assessed for **past** violations of cease and desist orders." (920 F2d at p.1356). 12 USC 1818(i)(2) is a penal statute providing for imposition of civil money penalties for violations of a cease and desist order signed by the directors of Rushville National Bank (hereinafter referred to as "Bank") and its regulatory agency, the Office of the Comptroller of the Currency (hereinafter referred to as "OCC"). The statutory language reads in pertinent part:

> "Any ... director ... who violates the terms of any order which has become final ... shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues.... As used in

this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 USC 1818(i)(2)(i); see also 12 USC 93(b) (as written in 1985). (underlining added).

The OCC sought to impose those civil money penalties on the Rushville National Bank directors (referred to hereinafter as "directors") for violations which appeared in the OCC's examination of the Bank dated January 31, 1985. The Notice of Assessment was dated October 25, 1985. That Notice alleged "past tense" violations:

> "The Office of the Comptroller of the Currency has issued a Notice of Assessment of a Civil Money Penalty against each member of the Board of Directors who participated ;in the violation..." (Cover letter to the Notice of Assessment from OCC dated October 25, 1985. underlining added).
>
> "This assessment is issued on the basis of violations ... which occurred ..." ...

> "The January 31, 1985 Report of Examination ... revealed that the Board of Directors violated ten (10) Articles..." ...
>
> "RESPONDENTS caused, brought about, participated in, counselled or aided and abetted the violation ..." (See Notice of Assessment of Civil Money Penalties, October 25, 1985) (underlining added).

Significantly, the October 1985 Notice of Assessment stated that the directors (Respondents) were afforded the administrative hearing pursuant to both 12 USC 93(b) and 12 USC 1818(i)(2), which contain identical present tense language.

Since the violations recited in the January 31, 1985 examination involved acts which were fully terminated by April 8, 1985, (See opinion below, 920 F2d at 1355) it is clear that the OCC seeks to impose liability on the bank directors for "past acts" by resort to a penal statute written in the "present tense." The directors

assert that there is no subject matter jurisdiction, and that the principles of statutory construction bar imposition of these civil money penalties.

1. The statutory language is clear; penal statutes are to be strictly construed. The directors urge that the language of Sections 93(b) and 1818(i)(2)(i) are clear and unambiguous in the "present tense" words. This Court has held:

> "It is well settled that "the starting point for interpreting a statute is the language of the statute itself. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)." Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376, at p. 381. (1987).

The words of these statutes (93(b) and 1818(i)(2)(i)) contain no language in the past tense. To rule that these statutes

apply to "past tense" behavior requires a change from the existing tense of the verbs.

In Tiffany v. The National Bank of the State of Missouri, 18 Wall 409, 85 US 862 (1873), the Supreme Court held:

> "In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it." Id., at 85 US 863.

This principle of statutory construction has continued intact to this day. In 1987, this Court specifically ruled that "past tense penalties" cannot be imposed under the terms of a "present tense" statute. This Court in Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376 (1987) held that federal

subject matter jurisdiction was not conferred by a statute containing the "present tense" language of Sec. 505(a) of the Clean Water Act, i.e., "alleged to be in violation." That language is less clearly "present tense" language than the case at bar. The present case contains more clear "present tense" language of "violates ... as long as the violation continues ... causing, aiding, abetting."

In the Seventh Circuit, there is a case from 1935 which is directly on point, strictly construing the statutory words "is violating" and "is attempting to manipulate." In Cutten v. Wallace, 80 F2d 140, the Seventh Circuit was analyzing the Grain Futures Act. The case is remarkably similar to the case at bar in that it compares Section 6(a) with 6(b) of the Grain Futures Act whereas the case at bar

involves the comparison of 12 USC Section 93(a) with 93(b). In both comparisons, subsection (a) contains "past tense language" whereas subsection (b) contains "present tense language." The Seventh Circuit held that to impose "past tense liability" under the "present tense language" would constitute the "usurping of the function of Congress." The Seventh Circuit stated:

> "The determination of the appeal, therefore, turns upon the use of the words "is violating" and "is attempting to manipulate" in said section.
>
> Respondents argue that although the statute uses the present tense, it should be so construed as to include past transactions. A rather strong and persuasive argument is made in favor of the wisdom of such a construction without which the power to deal with an offender is almost nil. We are, however, required to construe the statute,-not to pass upon its purposes, but upon its wording.
>
> Support for limiting the construction of the words so as to exclude instances where the violation has occurred may be found in section 6(a) (7 U.S.C.A. Sec. 8). There,

referring to the failure of the board of trade to comply with the requirements of the Act, we find the words "has failed or is failing" to comply with "any of the above requirements." What effect then must we give to the language of section 6(b) where the words "has failed" are omitted?

It is admittedly rather difficult to understand why Congress would, when dealing with the punishment of a Board, include past as well as present violations, whereas in section 6(b) when dealing with the punishment of the individual trader, it provides for punishment only when such person "is violating" or "is attempting to manipulate the market." ...

We are not, however, persuaded that the words of the statute here used can or should be so stretched as to include past violations which were committed and completed two years before the complaint was filed. ...

While respondents' counsel has ably argued that the commission should have the power to suspend for past transgressions and without such authority the section is sterile-yet they have not met the stubborn and inescapable fact that Congress has spoken in two successive sections. In one it expressly included past as well as present violations and in the next section specified only existing violations as grounds for suspension. To extend the latter section to the breadth of the former would be usurping the function of Congress." Cutten v.

Wallace, supra., at p. 142-144.

In comparison to the case at bar, Section 12 U.S.C. 93(a) uses the words participated and assented. Whereas, the very next subparagraph, Section 93(b) uses the present tense:

participating, violates, continues, ... causing, bringing about, participating in, counseling, or aiding or abetting a violation." 93(b) and 1818(i)(2)(i), (underling added).

Both in Cutten, supra., and the case at bar, the precedent is binding, and the legal reasoning is equally compelling. (The Seventh Circuit opinion in the case at bar does not refer to its own precedent in Cutten v. Wallace).

Further reinforcing this legal reasoning, this Court stated:

> "Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option." Gwaltney, 108 S Ct at page

381.

The U.S. Supreme Court recited the contention of the prevailing party in Gwaltney at p. 380, paragraph 2:

> "Gwaltney argued that the language of Sec. 505(a), ... requires that a defendant be violating the Act at the time of suit. Gwaltney urged the District Court to adopt the analysis of the Fifth Circuit in Hamker v. Diamond Shamrock Chemical Co., 756 F2d 392 (1985), which held that "a complaint brought under [Sec. 505] must allege a violation occurring at the time the complaint is filed." Id., at 395. Gwaltney contended that because its last recorded violation occurred several weeks before respondents filed their complaint, the District Court lacked subject-matter jurisdiction over respondents' action." (Gwaltney, supra., at page 380, underlining added). ...
>
> Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." Gwaltney, supra., at p. 381, underlining added.

The above stated contention is identical

to the contention of the directors in the case at bar. The statutory language bars imposition of civil money penalties for past acts.

2. Conclusory finding of ambiguity; misquote of Supreme Court's opinion. The Court below held that the statutory language was "ambiguous," thus opening the door to interpreting the intent of Congress. First, the directors strenuously argue that there is no ambiguity in the tense of the language contained in the statute, nor is there any ambiguity that the preceding section of law (93(a)) is written in the "past tense" evidencing that Congress knows how to write in both the past and present tense. The Court's conclusory statement that these words are ambiguous is directly contrary to their earlier interpretation

of the same language and analysis in Cutten v. Wallace, supra. The directors urge that the finding of "ambiguity" in the language is a goal oriented conclusion which contradicts binding rules of statutory construction that clearly apply.

Attempting to justify an "ambiguity," the Court below makes the conclusory statement that "the language in question is not so clear that it can support only the Directors' interpretation." (920 F2d at 1357). In a footnote on that page, the Court below misquoted the Supreme Court's opinion. The Seventh Circuit opinion states in the footnote:

> "Nonetheless, in dicta, the Court noted that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." (920 F2d at 1357).

The actual language of the opinion does not end with a period at that point. The opinion in its entirety states:

> "Because it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations, respondents contend, the parallel language of Sec. 309(a) and Sec. 505(a) must mean that citizens, too, may maintain such actions.
>
> Although this argument has some initial plausibility, it cannot withstand close scrutiny and comparison of the two statutory provisions." (Gwaltney, supra., at 108 S Ct 381-2, underling and emphasis added).

Thus, rather than being the holding of the Supreme Court, the quoted section in the Abercrombie footnote was merely the contention by the respondents which was rejected. (In addition, please note that the authority of the Administrator was never briefed in Gwaltney).

3. Pervasive use of the present tense. The opinion below states:

> "As this court noted in Abercrombie

> I, the Directors' reading of the statutory language can be characterized as "reasonable." 833 F2d at 676. Use of the present tense verbs throughout the subsection in question can be read as evidencing a congressional intent "to emphasize that Sec. 1818 provides a daily penalty for continuing violations" only, not for past violations. (Abercrombie II, 920 F2d at 1357).

Similarly, this Court in Gwaltney, supra., looked to the tense of the verbs in its statutory construction:

> "One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense." Gwaltney, supra., at p. 382, (underlining added).

There is no past tense language at all in 12 USC 93(b) or 1818(i)(2)(i); there is a pervasive use of the present tense.

4. This decision requires one to ignore words in the Legislative history. This decision re-writes the legislative history so that key prospective terms must

be completely ignored. The court below recites the purpose of the civil money penalties from the legislative history to "prevent or correct" violations. (920 F2d at 1358). There is no way to prevent or correct "past acts." The lower Court's decision requires the striking of those words from the legislative history. The legislative history does <u>not</u> say the purpose is to "punish for past acts;" it <u>says</u> to "prevent or correct" - prospective.

Another element contained in the legislative history of 12 USC 1818(i)(2)(i), is the word "cure:"

> "The combination of those powers plus the civil money penalty provisions gives the agencies the power they need to <u>cure</u> unsafe or unsound conditions and to <u>stop</u> violations of laws by holding companies.
>
> ... This latter civil money penalty provision should be particularly helpful in <u>curing</u> unsound or problem situations once they have arisen ..."

S.Rep. 95-323 (1977) at p. 9, underlining added.

If the civil money penalties were intended to apply to "past acts," then there would be no need to refer to the "curing" of acts which had already been terminated (past acts). Further, if the past acts were already "stopped," there would be no need to use the words "to stop violations" in the legislative history. (The Court below mis-stated the directors' argument on "cure." We have never argued that the Notice of Assessment must be suspended to allow for a cure. Our argument is as stated above.

The "self-enforcing" effect stated in the legislative history (Id.) means that once the Notice of Assessment is issued, the directors will not wait for hearings because they see daily penalties accruing,

so they will "stop" the violations by "themselves" to avoid daily penalties. A "self-enforcing effect" is prospective.

5. Amended statute, in pari materia, mandates statutory construction of prior act as barring liability for past acts. The law was amended. It did not remain the same. The Court below recites the amendment on page 1359. Under the rules of statutory construction, the subsequent statute which bars liability against these directors is the same binding construction that applies to the original statute, the statutes being in pari materia.

Under the original law, there was no wording at all that permitted liability for past acts; in the amended law, which is in pari materia in all other respects, there is a clarification of the extent of "past acts" liability. The liability for

"past acts" goes back only to

> after the completion of the last report of examination ..., occurring before the date of the enactment of this Act." (See opinion below, 920 F2d at p. 1359, (2)).

The Congress specifically addressed the issue of past tense liability, and narrowly confined it to circumstances that would not apply to these directors. The Court below admits that even the new law would not impose liability on these directors in this case:

> "Although this retroactive provision would not apply to the conduct in this case, this provision does indicate that Congress did not intend to attach prospective-only effect to the present tense language in the statute." (920 F2d at p. 1359, underlining added).

Had Congress intended to impose liability for all past acts, the new statute would have included such past tense liability within the language of the amendment that dealt with the extent of

past acts liability - but it did not. The new statute definitely prohibits the kind of past tense liability imposed under the case at bar, under the rules of statutory construction for statutes **in pari materia**.

In Alexander v. Alexandria, 5 Cranch 1, 3 L.Ed. 19 (1809) the rule of statutory construction for statutes **in pari materia** was enunciated:

> "...acts in pari materia are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law." (Id., 3 L Ed at p. 21).

The binding rule of statutory construction was reiterated in United

States v. Freeman, 3 How 556, 11 L.Ed 724 (1845):

> "If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." Id., 11 L Ed at p. 728.

In United States v. Montgomery Ward & Co., 150 F2d 369, the rule of statutory construction is stated:

> ""Unless the context indicates otherwise, words and phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense." Section 5201, Sutherland, on Statutory Construction." (Id., at p. 376).
>
> "More recently, in United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102, 105, 85 L.Ed. 40, the court said: "It is clear that 'all acts in pari materia are to be taken together, as if they were one law.' ... That these two acts are in pari materia is plain. Both deal with precisely the same subject

matter ***. The later act can therefore be regarded as a legislative interpretation of the earlier act..." (p. 376).

"... a rather heavy load rests on him who would give different meanings to the same word or the same phrase ... in Acts which are **in pari materia** with each other." (Id., at 377).

In Garner v. Louisiana, 368 US 157, 7 L Ed.2d 207, 82 S Ct 248 (1961), it was said:

"Shortly after the events for which the petitioners were arrested took place, the legislature amended its disturbance of the peace statute in an obvious attempt to reach the type of activity involved in these cases." (Id., at p. 216).

In the case at bar, the Congress amended its statute to reach "past acts" liability, and Congress added restricted liability for past acts which would have excluded liability for these directors. The fact that the statute was amended to address the critical issue and declined to impose liability as sought by the OCC is

a binding rule of statutory construction on the courts.

6. The "Notice of Assessment" is a document mandated by procedural due process; it is not gratuitous. In oral argument in Abercrombie I (833 F2d 676), in describing the "Notice of Assessment" initiating the administrative process, Circuit Judge Manion coined the phrase "Procedural Due Process Notice Date." It is an apt description. It initiates the civil money penalty process. It is the sole document which recites "violations."

The Court below stated:

> "The banker under a cease and desist order operates with the knowledge that any deviation from that order ... will result in a significant penalty - whether the authorities discover the violation immediately or later." (920 F2d at 1359).

There are two fatal defects to the argument that the C&D Order constitutes

the required "Notice": 1) the C&D Order does not allege "violations" and 2) if the C&D Order constitutes the required "Notice" then the actual "Notice of Assessment" is rendered gratuitous.

In Gwaltney, this Court rejected the idea of a "gratuitous" notice:

> "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." (Gwaltney, at p. 382, 3).

As in Gwaltney, supra., the "Notice of Assessment" is not a gratuitous act. It is intended as the Notice to directors to stop or cure the violation immediately or face daily penalties, and it is the Procedural Due Process Notice which is the sole charging document. The Court's statement below means that the C&D Order is a charging document which it is not, and if it were upheld, would render the

actual "Notice of Assessment" gratuitous in contravention of Gwaltney. The Court below recited that the "days of violations" were required to be produced (see 920 F2d 1355). The civil money penalties were based on those "days" from the specified articles which were all concluded by April 8, 1985 (Id.), with the Notice of Assessment issued on the Due Process Notice Date of October 25, 1985. Liability for violations which are past acts must look to other enforcement laws; there is no liability for past acts under the "present tense" language of 12 USC 93(b) and 12 USC 1818(i)(2(i).

REASONS FOR GRANTING THE PETITION

The reasons for granting this Petition are as follows:

I. The decision below violates existing precedent from this Supreme

Court, (Gwaltney, supra.) and misquotes the rejected argument of a party in that case as if it were the Court's holding. The opinion below is Plain Error. Further, to allow the misquoted opinion to stand uncorrected could cause an "avalanche of errors" in other courts.

II. The opinion below is contrary to Rules of statutory construction. The language in the statute is clear and unambiguous. Further, the rules of statutory construction require strict construction of penal statutes. This opinion re-writes "past tense" language into a statute devoid of such language.

III. This opinion is contrary to the Seventh Circuit's own binding precedent in Cutten v. Wallace, supra. In addition to its strict construction of present tense language, the precedent is on point in

that in both statutes analyzed, subsection (a) uses the past tense while subsection (b) uses the present tense - confirming that Congress knows how to select the appropriate tense.

IV. The opinion below requires legislative history to be ignored. The expressed statutory purpose "to prevent and correct;" cannot apply to past acts. Other terms in the legislative history such as to "cure" and to "stop" violations have no meaning under this ruling.

V. The opinion below imposes a judicial construction on the re-enacted statute (FIRREA, 1989 - see 920 F2d 1359) authorizing civil money penalties for past acts beyond the narrow and limited scope specifically recited in that law.

VI. The opinion below is contrary to the rules of statutory construction for

statutes **in pari materia.**

VII. This ruling denies procedural due process to bank directors who first learn that "daily penalties" are accruing only by virtue of the "Notice of Assessment."

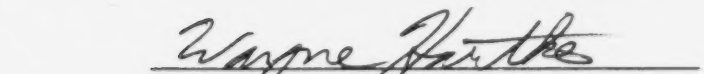
CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

DATED: April 22, 1991.

Respectfully submitted,

Wayne Hartke, Hartke & Hartke



Wayne Hartke

Attorney for Petitioners

Certificate of Service

I hereby certify that 3a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed, certified mail, return receipt requested to Mr. Jeff Gillespie, Office of the Comptroller of the Currency, 490 L'Enfant Plaza, S.W., Washington, D. C. 20219 on this 22nd day of April, 1991.

Wayne Hartke

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APPENDIX A

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,
Petitioners-Appellants,

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent-Appellee.

Appeal No. 89-2407

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Decided December 26, 1990
Rehearing and Rehearing En Banc
Denied January 23, 1991.

Comptroller of Currency assessed civil money penalties against bank directors for past violations of cease and desist order. Directors appealed. The Court of Appeals, Ripple, Circuit Judge, held that (1) Comptroller had legal authority to assess civil money penalties for past violations of cease and desist orders; (2) statute did not restrict assessment of penalties

only to continuing violations; (3) assessment for violations which occurred prior to issuance of notice was not arbitrary; and (4) Comptroller's determination that gravity of violations justified civil money penalties was supported by substantial evidence.

Affirmed.

The petitioners (referred to collectively as the Directors) served during the relevant period as directors of the Rushville National Bank of Rushville, Indiana (Bank). They seek review of a decision of the Comptroller of the Currency (Comptroller) that assessed civil money penalties against them for violations of cease and desist orders. For the following reasons, we affirm the decision of the Comptroller.

I BACKGROUND

A. Statutory authority

The Comptroller is authorized to order banks and their directors to cease and desist from any violations of law or "unsafe or unsound practice." 12 U.S.C. Sec. 1818(b)(1). Such cease and desist orders may be imposed by consent or may be mandated after a hearing. Id. The Comptroller has discretionary authority to seek enforcement of cease and desist orders in actions brought in federal district courts, id. Sec. 1818(i)(1), or to impose civil money penalties for violation of such orders, id. Sec. 1818(i)(2). For the period in question, the provision authorizing civil money penalties read in pertinent part:

> Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued

> pursuant to subsection (b), (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues... As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

Id. Sec. 1818(i)(2)(i).[1] The amount of the penalty was to reflect the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Id. Sec.

[1]Subsequent to the events involved in this case, Congress amended section 1818 to provide for larger daily civil money penalties. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, Sec. 907(a), 103 Stat. 183, 462-64 (codified at 12 U.S.C.A. Sec. 1818(i)(2) (West 1989). Unless otherwise noted, all references to section 1818 in the text are to the version in effect during the relevant period.

1818(i)(2)(ii).

The statute also set out certain procedural requirements. It required the Comptroller to issue a written notice, id. Sec. 1818(i)(2)(i), and permitted those receiving such notice to request an administrative hearing, id. Sec. 1818(i)(2(iii). After such a hearing, the Comptroller made a final decision with respect to penalties. Those against whom civil money penalties were assessed could petition for review by the court of appeals. Id. Sec. 1818(i)(2)(iv).

B. Procedural History

1. Initial administrative proceedings

Pursuant to 12 U.S.C. Sec. 1818(b)(1), the Comptroller and the Bank, through the Directors, entered into a cease and desist order (Consent Order) on June 29, 1983. This Consent Order consisted of sixteen

articles, which outlined steps that the Directors were to take to improve the safety and soundness of the Bank. Additional examinations and meetings between regulators and the Directors followed. Regulators expressly warned the Directors that they faced the assessment of civil money penalties if they failed to comply with the Consent Order. An amended Consent Order was agreed to on June 19, 1984. Regulators continued to find violations of the amended Consent Order. For example, the January 31, 1985 examination[2] found violations of ten articles. The letter transmitting the report of this evaluation to the Directors

[2] The examination was actually conducted in February and March 1985, but is referred to as the January 31, 1985 examination because that is the final date for which financial information was evaluated.

again warned them that they faced the assessment of civil money penalties. Moreover, on June 21, 1985, each Director was sent a letter notifying him that the Comptroller was

> considering whether to assess civil money penalties against the individual members of the Board of Directors... Any such assessment will be founded upon our determination that the individual members of the Board of Directors violated the provisions of 12 U.S.C. Sec. 1818 by failing to substantially comply with the Order to Cease and Desist dated June 29, 1983, and its Amendment dated June 19, 1984.

Ex. OCC24 at 1.

The Comptroller issued a Notice of Assessment of a Civil Money Penalty against the Directors on October 25, 1985.[3] The October 1985 Notice indicated

[3] This notice was amended to correct certain technical and typographical errors on December 5, 1985. For the sake of simplicity, we shall refer to the notices collectively as the October 1985 Notice.

that the penalties were to be issued on the basis of violations of the amended Consent Order, as outlined in the report of the January 31, 1985 examination. The Notice did not specify on which days the alleged violations occurred, nor did it expressly indicate that the violations were continuing as of the date of the Notice. Director Hedrick was assessed a civil money penalty of $15,000, and Directors Abercrombie, Calloway, Eckel, and Sloan were assessed $10,000 each.[4]

The Directors requested an administrative hearing. Before the hearing could be held, however, the Directors filed a motion asking the administrative law judge (ALJ) to dismiss

[4] Director William F. Smith was also assessed a penalty of $10,000. He settled with the Comptroller and is not a party to this appeal.

the proceedings. The Directors cited **Larimore v. Comptroller of Currency**, 789 F2d 1244 (7th Cir. 1986)(en banc), for the proposition that the Comptroller lacked authority to impose personal liability against them without filing suit in district court. The Directors further argued that civil money penalties could not be assessed administratively for past violations because the use of the present tense verb "continues" in the penalty clause of 12 U.S.C. Sec. 1818(i)(2)(i)[5] "requires the violation to be in the present tense." Respondent's [sic] Br. in Support of Their Motion to Dismiss at 2. The ALJ denied this motion.

[5] The relevant clause provided for a "civil penalty of not more than $1,000 per day for each day during which such violation continues." 12 U.S.C. Sec. 1818(i)(2)(i).

2. Judicial proceedings

The Directors then filed suit in district court, seeking to enjoin the administrative proceedings. **See Abercrombie v. Office of Comptroller of Currency**, 641 F.Supp. 598 (S.D.Ind.1986). Again relying on **Larimore** and on their contention that the present tense language of subsection 1818(i)(2)(i) authorized the Comptroller to impose civil money penalties only for continuing violations, the Directors argued that the agency lacked jurisdiction to impose the penalties. **See id.** at 601. The district court concluded, however, that the court lacked jurisdiction over the Directors' action. **Id.** at 600. The court noted that 12 U.S.C. Sec. 1818(i)(1) strictly limited the jurisdiction of courts to enjoin administrative proceedings involving civil

money penalties. Id. Moreover, the statute provided for review of final agency action by the courts of appeal. See id. (citing 12 U.S.C. Sec. 1818(i)(2)(iv)). The district court concluded that the Comptroller's actions in this case did not fall within a judicially recognized exception to subsection 1818(i)(1) because it did not involve a "clear departure from statutory authority." Id. (citing **Groos Nat'l Bank v. Comptroller of Currency**, 573 F2d 889, 895 (5th Cir.1978).

This court affirmed. **Abercrombie v. Office of Comptroller of Currency**, 833 F2d 672 (7th Cir.1987) (**Abercrombie I**). It reasoned that the "'statutory authority' exception" to the limitation on federal court jurisdiction found in subsection 1818(i)(1) applies only when the agency's

action is "'blatantly lawless[.]'" **Id.** at 675 (quoting **Oestereich v. Selective Serv. Sys. Local Bd. No. 11**, 393 U.S. 233, 238, 89 S.Ct. 414, 416, 21 L.Ed.2d 402 (1968)). For two reasons, this exception did not apply. First without deciding the issue, the court observed that this case "does not appear to [be] control[led]" by **Larimore**. **Abercrombie** I, 833 F2d at 676. In **Larimore**, the court held that the Comptroller's authority to issue cease and desist orders under 12 U.S.C. Sec. 1818(b)(1) did not authorize an order to directors personally to indemnify a bank for losses caused by violating statutory limits on the amount of loans given to any one borrower. 789 F2d at 1245. Such an order amounted to the imposition of "personal liability" against the directors. **Id.** The court in **Larimore**

reasoned that such personal liability could not be imposed administratively under subsection 1818(b)(1), but only judicially under 12 U.S.C. Sec. 93(a).[6] Id. at 1256. In **Abercrombie I**, the court observed that the nature of the remedy involved in this case differed from the damages at issue in **Larimore**:

> Section 93(a) is a damages provision; it provides that bank directors may be liable to reimburse the bank or other people the directors have injured by violating banking laws. Section 1818(i)(2)(i), on the other hand, is a penalty provision designed to punish and deter violations of cease and desist orders. The Comptroller need

[6] This statute authorized the Comptroller to sue in district court to determine whether specified banking laws have been violated and whether the franchises of such banks should therefore be forfeited. 12 U.S.C. Sec. 93(a). "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." Id.

> not prove damages to collect [civil money penalties]. Here, unlike in **Larimore**, the Comptroller does not seek to have the directors reimburse the bank or any other persons for losses resulting from the directors' activities. Instead, the Comptroller simply seeks to impose a penalty on the directors; the money the Comptroller collects will go to the United States Treasury, not to the Bank or any other person. 12 U.S.C. Sec. 1818(i)(2)(vii).

Abercrombie I, 833 F2d at 676.

Second, the court in **Abercrombie** I concluded that the Comptroller's interpretation of his authority to assess civil money penalties for past violations under subsection 1818(i)(2) was not so unreasonable as to be "'blatantly lawless'". Id. at 675-77, The court made clear that it was **not** deciding the merits of the Directors' complaint: "[W]e do not determine whether the Comptroller actually did or did not violate his statutory authority; we hold only that any violation

was not a clear violation." Id at 675.

3. Additional administrative proceedings

The case thus returned to the administrative arena. On January 27, 1988, the October 1985 Notice was amended to indicate that "[e]vidence and details of the violations" were contained in reports issued both before and after the January 31, 1985 examination report. Amended Notice at 1-2. On the first day of the hearing, the ALJ insisted that the specific days of the alleged violations be identified. Tr. of Mar. 15, 1988 at 30-31. A handwritten list was prepared, indicating that the violations continued at least until April 8, 1985.

The ALJ rejected the Directors' contention that section 1818 authorized civil money penalties only for continuing

violations. ALJ Recommended Decision and Order at 113. The ALJ concluded that the Consent Order had been violated, id. at 128, although he found no violation of two articles in the Consent Order, id. at 124. After taking into account the factors found in subsection 1818(i)(2)(ii), the ALJ recommended that the civil money penalty assessments be reduced to $2,000 for Director Hedrick and $1,000 each for Directors Abercrombie, Eckel, Calloway, and Sloan. Id. at 130.

The Comptroller then issued the final decision that is the basis of this appeal. **In re Hedrick**, No. AA-EC-85-120 (Office of the Comptroller of the Currency June 20, 1989) [hereinafter Comptroller's Decision]. The Comptroller concluded that subsection 1818(i)(2)(i) "authorizes the imposition of [civil money penalties] for

past, present, and continuing violations of a cease and desist order." Id. at 7. The Comptroller reasoned that Congress' goals of "discourag[ing] unsound practices and [making] cease and desist orders self-enforceable" could not be served if civil money penalties were available only for ongoing violations. Id. "Moreover, institutions and individuals subject to an order will be less likely to change their conduct if they can violate the order repeatedly and then correct the violations when a Notice appears imminent." Id. at 7-8. The Comptroller also observed that there was no statutory requirement that those in violation of a cease and desist order be given time to cure their violations after the notice of assessment, for cease and desist orders themselves are "adequate notice." Id. at 10.

Furthermore, the Comptroller concluded that the final assessment could be based on evidence of violations not charged in the original notice of assessment, provided the notice was "amended, as was done in this case," id at 13, to give the Directors an opportunity to respond to the true scope of the agency's contentions. Id. at 14.

The comptroller found the Directors in violation of nine of the ten articles, including one of the two articles for which the ALJ had found no violations.[7]

[7] The Comptroller concurred with the ALJ's conclusion that there was insufficient evidence to establish a violation of Article XVIII (requiring the Directors to notify the agency of its intended response to a consultant's report on expenses paid to insiders). Comptroller's Decision at 55-60. The Comptroller rejected, however, the ALJ's conclusion that there was insufficient evidence to find a violation of Article XII (requiring the Directors to submit detailed budget documents and operating

Id at 12. Violations of at least two articles of the amended Consent Order continued even after the October 1985 Notice. Id. at 18, 25. The Comptroller noted the duration of some of the violations:

> While no precise count has been made of the aggregate number of days that the [Directors] were in violation, the number exceeds 300 days just for Article III (requiring documentation for additional loans to criticized borrowers). For Article XII (requiring submission of budgets and operating assumptions), the violation extended ... at least ... 61 days.

Id. at 61-62 (citations omitted). While not imposing the "hundreds of thousands of dollars" of civil money penalties that the Directors thus potentially faced, id at 62, the Comptroller disagreed somewhat with the ALJ's treatment of the statutory factors found in 12 U.S.C. Sec.

assumptions). Id. at 41-45.

1818(i)(2)(ii). For example, the ALJ had noted at least some indications of good faith, ALJ Recommended Decision and Order at 123, and had somewhat minimized the gravity of the violations, id. at 124-25. The Comptroller, in contrast, found the Directors' "good faith to be seriously deficient," Comptroller's Decision at 65, and found the violations to be "more serious" than had the ALJ, id at 67. The Comptroller's final assessment was $15,000 for Director Hedrick and $10,000 each for Directors Abercrombie, Calloway, Eckel, and Sloan. Id. at 70.

II ANALYSIS

[1] The basic question before us is whether the Comptroller appropriately determined that civil money penalties could be assessed for past violations of cease and desist orders. The Directors

contend that both the "present tense" language of the statute and its legislative history "require[] the conclusion that [civil money penalties] can only be assessed for violations which are in the "present tense", existing at the time the Directors are given the "Notice of Assessment" of [civil money penalties]." Petitioners' Br. at 1-2 (emphasis in original). The Comptroller, on the other hand, contends that the language authorizing civil money penalties of "not more than $1,000 per day for each day during which such violation continues" was "intended only as a limitation on the maximum amount of the penalty and was not intended to specify the types of violations for which penalties could be assessed." Respondent's Br. at 27. Alternatively, the Comptroller argues that

the language "is sufficiently ambiguous as to permit that interpretation." Id. Furthermore, he contends that legislative history support his interpretation of the statutory language.

A. Statutory construction

The essential task of a reviewing court that faces an issue of statutory construction is well established. We first must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." **Chevron U.S.A. v. Natural Resources Defense Council**, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). However, if the administering agency fills a gap in the

statute, the court must determine "whether the agency's answer is based on a permissible construction of the statute." **Id.** at 843, 104 S.Ct. at 2782; **see also Fort Stewart Schools v. Federal Labor Relations Auth.**, --- U.S. ---, 110 S.Ct. 2043, 2046, 109 L.Ed.2d 659 (1990); **Larimore v. Comptroller of Currency**, 789 F2d 1244, 1248 (7th Cir., 1986)(en banc) ("agency's interpretation of its authorizing statute need not be the only permissible one in order for it to be sustained").

We must begin with the language of the statute itself. **See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.**, 484 U.S. 49, 108 S.Ct. 376, 380, 98 L.Ed.2d 306 (1987). As this court noted in **Abercrombie I**, the Directors' reading of the statutory language can be

characterized as "reasonable." 833 F2d at 676. Use of present tense verbs throughout the subsection in question can be read as evidencing a congressional intent "to emphasize that Sec. 1818 provides a daily penalty for continuing violations" only, not for past violations. Id. On the other hand, the language in question is not so clear that it can support only the Directors' interpretation. The Comptroller's interpretation of the statutory language is also a reasonable reading.[8]

[8] [8] In support of their argument that the present tense language in the statute precludes penalties for past violations, the Directors have cited the Supreme Court's decision in **Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation**, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). The Court in **Gwaltney** held that 33 U.S.C. Sec. 1365(a) (section 505(a) of the Clean Water Act), which authorizes citizen suits against those "alleged to be in violation," does not permit such suits "for wholly past

Because the statutory language itself is ambiguous, we must turn to other

violations." 484 U.S. at 64, 108 S.Ct. at 384-85. As one part of its rationale, the Court noted: "One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout Sec. 505." Id at 59, 108 S.ct. 382.

Nonetheless, in **dicta**, the Court noted that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." Id. at 58, 108 S.Ct. at 381-82. Subsection 309(d) of the Clean Water Act, which authorizes the civil penalties for violations of that statute, also uses present tense language - although not the more graphic and specific "alleged to be in violation."

> Any person who violates [specified sections of the statute] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. Sec. 1319(d).

Consequently, we do not find **Gwaltney** contrary to the Comptroller's position. Indeed, it is somewhat supportive of his position. The language of subsection 309(d) of the Clean Water Act is virtually identical to the language of 12 U.S.C. SEc. 1818(i)(2)(i).

evidence of congressional intent. Therefore, in order to determine whether the Comptroller's decision can be affirmed, we shall next consider what the legislative history and the structure of the statute reveal about the role of the civil money penalty provision in the statutory scheme.

The Comptroller was first authorized to issue cease and desist orders against individuals in 1978. **See** Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA), Pub.L. No. 95-630, Sec. 107(a)(!), 92 Stat. 3641, 3649-50. FIRA also authorized the assessment of civil money penalties for violations of such orders. **Id.** Sec. 107(e)(1), 92 Stat. at 3660.[9]

[9] FIRA also amended section 93 by adding a civil money penalty provision, which was similar to the provision of

To support their contention that civil

section 1818, for the violation of banking laws, and regulations. See Pub.L. No. 95-630, Sec. 103, 92 Stat. 3641, 3643-44 (1978) (codified as amended for the period relevant to this case at 12 U.S.C. Sec. 93(b) and as further amended at 12 U.S.C.A. Sec. 93(b)(West Supp. 1990). Subsection 93(b), unlike subsection 93(a), does not include a requirement that the Comptroller seek enforcement in the courts. The court in **Larimore v. Comptroller of Currency**, 789 F2d 1244 (7th Cir.1986)(en banc), rejected the Comptroller's contention that section 93 thus provided an option to proceed administratively or to sue in district court when seeking to impose personal liability on directors. However, as did the court in **Abercrombie I**, 833 F2d at 876, we conclude that this case can be distinguished from **Larimore** because of the difference between the penalty provision involved here and the damages involved in **Larimore**. Moreover, subsequent to this court's decision in **Larimore**, Congress amended the cease and desist provision of section 1818 to authorize the Comptroller to order indemnification in cases involving unjust enrichment or recklessness. **See** Financial Institutions Reform, REcovery, and Enforcement Act of 1989, Pub.L. No. 101-73, Sec. 902(a)(1)(C), 103 Stat 183, 450 (codified at 12 U.S.C.A. Sec. 1818(b)(6)(A)(West 1989).

money penalties may be imposed only for continuing violations, the Directors point to a number of phrases from a Senate report on a bill that included provisions that ultimately became part of FIRA. As the Directors emphasize, the report indicated that the purpose of civil money penalties was "to help prevent or correct" problems that threatened "the safety or soundness" of banks. S.Rep No. 323, 95th Cong., 1st Sess. 16-17 (1977). Similarly, civil money penalties were to serve as a "deterrent," id. at 8, and were to help make cease and desist orders "self-enforcing," id. at 9.[10] The thrust of the

[10] The Directors also contend that the legislative history indicated that civil money penalties could be imposed administratively only if there existed no other "'effective remedy.'" Petitioners' Br. at 31 (quoting S.Rep. No 323, 95th Cong., 1st Sess. 17 (1977)). They further contend that 12 U.S.C. Sec. 1818(i)(1), which authorizes the Comptroller to seek

Directors' interpretation of the legislative history is that imposition of civil money penalties for past violations cannot serve these goals:

> How does one "deter" past acts? There is no way to deter past acts because they have already occurred, and they are not deterred because they occurred and its [sic] all over with. No amount of dollar penalty can deter a past act.

Petitioners' Br. at 36.

The Directors correctly identify the congressional concern with respect to the safety and soundness of the banks. We do not believe, however, that the legislative

enforcement of cease and desist orders in district court, provided an alternative remedy and that the Comptroller thus was compelled to proceed under that provision or choose some other effective remedy before resorting to the imposition of civil money penalties under subsection 1818(i)(2). However, subsection 1818(i)(1) expressly gives the Comptroller "discretion" to seek judicial enforcement, and we decline to adopt the Directors' reading of congressional intent.

history, read in its entirety, supports the view that Congress saw no value in punishing past violations of an extant cease and desist order. Indeed, the same report relied on by the Directors appears to have contemplated the availability of civil money penalties for past violations, noting that they were "to be assessed **from the first day of the occurrence of any violation.**" S.Rep. No. 323, 95th Cong., 1st Sess. 8 (1977)(emphasis supplied). In similar fashion, the House report noted a need to deal with bank officers "who **have committed** abuses, wherever they may be employed" at the time the Comptroller has sufficient evidence to take action. H.R.Rep. No. 1383, 95th Cong., 2d Sess. 240 (1978), U.S. Code Cong. & Admin.News 1978, pp. 9273, 9370 (minority views)(emphasis supplied). Civil money

penalties also were made applicable only to violations that occurred after enactment of FIRA. See id. at 17-18. At first glance, this element of the legislative history might appear to support the Directors' contention. However, if the committee understood the present tense language of the statute to apply only to continuing violations, there would have been no reason to emphasize that the provision was not retroactive.

Moreover, the Directors' reading of the legislative history ignores the general deterrence function of civil money penalties. Although the Directors in this case can no longer be deterred from violation the Consent Order for the period in question, the potential of civil money penalties could have a strong deterrent effect on other bank officials and,

indeed, on these bank officials in the future.

[2] More fundamentally, the Directors' argument that violators of a cease and desist order must be given an opportunity to comply before they incur monetary sanctions for their violation renders ineffective the role of cease and desist orders in the enforcement of the country's banking laws. If a penalty may be exacted only after the violator once again has endangered the health of the financial institution by flouting the cease and desist order, a good deal of the enforcement potential of such orders is lost. They are meant to have a "self-enforcing" effect on the banking community. Under the directors' interpretation, it would be impossible to fulfill the congressional expectation that

penalties be exacted "from the first day" of the violation. **See** S.Rep. No. 323, 95th Cong., 1st Sess., 8-9 (1977). Civil money penalties are designed to deter not only willful violations but negligent ones as well.[11] The banker under a cease and desist order operates with the knowledge that any deviation from that order-purposeful or otherwise-will result in a significant penalty-whether the authorities discover the violation immediately or later.

Although the legislative history and structure of FIRA does not prove definitively that Congress intended civil money penalties to be available for past violations, we cannot say that the

[11] **Compare** 12 U.S.C. Sec. 93(a) (expressly proscribing knowing violations) with **id.** SEc. 1818(i)(2)(i) (indicating no intent element).

Comptroller's interpretation of congressional intent is unreasonable. Indeed, there is significant support for his position. Consequently, we must conclude that the Comptroller's interpretation of his statutory authority is not impermissible. **See Chevron U.S.A. v. Natural Resources Defense Council**, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

Our conclusion to accept the Comptroller's reading of the statute is bolstered by the re-enactment of civil money penalty provisions in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183 (FIRREA). It is significant that these provisions continue

to use present tense language.[12] See id. SEc. 907(a), 103 Stat at 462-64 (codified at 12 U.S.C.A. Sec. 1818(i)(2)(West 1989)). Yet, it is abundantly clear that Congress intended the present tense language to apply to past acts. FIRREA provides for retroactive application of

[12] See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974) ("[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.") (footnotes omitted); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986); Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F2d 310, 316 (7th Cir.1987) cert. denied, 488 U.S. 816, 109 S.Ct. 54, 102 L.Ed.2d 33 (1988). But cf. International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 571, 99 S.Ct. 790, 802, 58 L.Ed.2d 808 (1979) (Burger, C.J., concurring)(understanding of draftsman of amendment in 1970 "would have little, if any bearing" on "construction of definitions enacted in 1933 and 1934").

the new maximum penalties if the conduct

> (1) is not already subject to a notice (initiating an administrative proceeding) ...; and
> (2) occurred after the completion of the last report of examination of the institution involved by the appropriate Federal banking agency ... occurring before the date of the enactment of this Act.

Id. Sec. 907(1), 103 Stat. at 476-77 (codified at 12 U.S.C.A. Sec. 93 note). Although this retroactive provision would not apply to the conduct in this case, this provision does indicate that Congress did not intend to attach prospective-only effect to the present tense language in the statute.

Moreover, section 905(a) of FIRREA authorizes imposition of civil money penalties against individuals even after they have left the service of the covered institution. Id. Sec. 905(a), 103 Stat. 459 (codified at 12 U.S.C.A. Sec.

1818(i)(3). Thus, civil money penalties now are certainly available for past violations. The legislative history of this provision strongly suggest that it was intended as a clarification of existing authority. AS the report of the House Banking, Finance and Urban Affairs Committee stated: "This provision does not create a new offense, but clarifies when the banking agencies may initiate enforcement actions against individuals." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 393 (1989), U.S.Code Cong. & AdminNews 1989, pp. 86, 189.

B. Application to This Case

[3] The Directors submit that assessment for violations that occurred before the October 1985 Notice gave them no opportunity to cure their violations and limit their liability. They

specifically object to imposition of civil money penalties for violation of Article I (requiring the filing of progress reports on compliance with the Consent Order every sixty days) because a bank examiner had allegedly led them to believe that they were in compliance with that article. The Directors claim that they believed Article I required a compliance report only after the first sixty days, but now acknowledge that they were not in compliance with Article I. Petitioners' Br. at 27. The Directors' contention that they were unfairly misled about Article I is meritless. As the Comptroller noted, "[t]he language of Article I plainly requires the filing of reports ... every sixty days." Comptroller's Decision at 15.

More generally, although it is true

that the issuance of a notice of assessment formally started the procedure by which civil money penalties were imposed,[13] between the time the Directors agreed to the Consent Order and the issuance of the formal notice, the Directors were repeatedly notified that they were not complying with the Consent Order and that they faced the imposition of civil money penalties. The Comptroller did not lull the Directors into a false sense of security by encouraging them to believe that they were in full compliance with the Consent Order and then impose massive civil money penalties for past violations. On this record, we cannot conclude that the Comptroller acted arbitrarily.

[13] See 12 U.S.C. SEc. 1818(i)(2)(i).

[4] The Directors also press an alleged inconsistency between the Comptroller's decision and a position adopted by counsel for the Comptroller at a pre-hearing conference. At that conference, counsel acknowledged that the only charged violations were those included in the report of the January 31, 1985 examination. Petitioners' Br. at 43-44 (citing Tr. of Feb. 26, 1988 at 46). The Directors emphasize that the conference occurred **after** the January 27, 1988 amendment of the October 1985 Notice (which in turn incorporated the violations in the January 31, 1985 report). Although the focus of the Comptroller's final decision was the ten articles in the October 1985 Notice, the decision also reflected later violations of those same articles. **See** Comptroller's Decision at

18, 22.

[5] The Comptroller reasoned that the January 27, 1988 amendment of the October 1985 Notice gave the Directors "'a reasonable opportunity to know the claims of the opposing party and to meet them.'" Id. at 14 (quoting **Morgan v. United States**, 304 U.S.1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938)). As this court has noted, "[i]t is, of course, well settled that administrative pleadings are to be liberally construed and amended." **Brock v. Dow Chem. U.S.A.**, 801 F2d 926, 930 (7th Cir.1986); **see also L.G. Balfour Co. v. Federal Trade Comm'n**, 442 F2d 1, 19 (7th Cir.1971) ("There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the

administrative complaint is to give the responding party notice of the charges against him."). Administrative pleadings not only may be amended prior to a hearing but also may be clarified during a hearing. See Swift & Co. v. United States, 393 F2d 247, 252 (7th Cir.1968). Absent evidence that a party is misled by an administrative complaint, resulting inn "prejudicial error," we shall not reverse. L.G. Balfour, 442 F2d at 19.

We believe that any inconsistency in the position of the agency, as a result of the statement of counsel at the pre-hearing conference, produced no unfairness. At the hearing itself, the ALJ made clear that he was allowing the introduction of evidence of continuing violations:

> I'll tell you one of the reasons I'm taking is if it's true that present

> tense violations are only the ones for which civil money penalties may be assessed, I would tend to believe that [the Comptroller] is going to argue that the bank is still violating.

Tr. of Mar. 23, 1988 at 62. Thus, the Directors were aware that they potentially faced liability for post-notice violations of the ten articles originally specified in the October 1985 Notice. On this record, we cannot say that the Comptroller committed prejudicial error.

[6] Finally, the Directors contend that civil money penalties are unjustified in this case because the violations for which they were penalized "'were not of sufficient gravity to endanger the safety of the bank.'" Petitioners' Br. at 32 (quoting ALJ Recommended Decision and Order at 128). However, earlier in the same sentence that the Directors quote, the ALJ did find that "the gravity of the

violations were deviations from fully safe and sound banking practices." ALJ Recommended Decision and Order at 127. Moreover, in context, this finding related to one of the factors in 12 U.S.C. Sec. 1818(i)(2(ii), which concerned the appropriate amount of the penalty, not the propriety of assessing any penalty at all. The Comptroller determined that the gravity of the violations was more serious than had the ALJ. See Comptroller's Decision at 67. The Directors have not established that the Comptroller's final assessment was unsupported by substantial evidence.

CONCLUSION

Finally, although we hold that the Comptroller had the legal authority to impose civil money penalties for actions occurring between the issuance of the

cease and desist order and notice of assessment, such authority, even under this now-superseded statutory scheme, was hardly without significant restraints. The statute required that the Comptroller tailor the penalty according to specific criteria. No penalty was assessed without a hearing, and, finally, the Comptroller's determination has been subject to review in this court. As the House committee report noted when these safeguards were first proposed, they should assure that the Comptroller and other agencies with analogous civil money penalty powers "are not arbitrary and capricious in their use of civil money penalties." H.R.Rep. No. 1383, 95th Cong.., 2d Sess 18 (1978), U.S.Code Cong. & Admin. News 1978, p. 9290.

For the foregoing reasons, the decision

of the Comptroller is affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 13 1991
OFFICE OF THE CLERK

90-1626

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,

Petitioners

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF	)
DONALD E. HEDRICK, ET AL., DIRECTORS,	)
AA-EC-85-12-	)
RUSHVILLE NATIONAL BANK,	)
RUSHVILLE, INDIANA	)

DECISION OF THE COMPTROLLER OF THE CURRENCY

I. Summary

Pursuant to 12 U.S.C. SEC. 1818 (i) (2) (i), the Comptroller of the Currency (Comptroller) assesses a civil money penalty (CMP) against the Respondents, Donald E. Hedrick, Manley Abercrombie, E. Weston Sloan, Richard F. Eckel, and Robert Q. Calloway, Directors of the Rushville National Bank, Rushville, Indiana (Bank), for violations of nine articles of an Order and Amended Order to Cease and Desist to which the Respondents

stipulated. After fully considering the record in this case and the statutory factors for determining the amount of a CMP set forth at 12 U.S.C. SEC. 1818 (i)(2)(ii), the Comptroller assesses Respondent Hedrick a CMP in the amount of $15,000, and the other Respondents a CMP in the amount of $10,000.

II. Major Issues

A. Whether civil money penalties can be assessed under 12 U.S.C. SEC. 1818 (i)(2)(i) for past violations of an order to cease and desist.

B. Whether Respondents violated the Order and Amended Order to Cease and Desist.

C. If violations are found, what the appropriate amount of the CMP should be in light of the factors set forth in 12 U.S.C. SEC. 1818 (i)(2)(ii).

III. Procedural History

This proceeding arises out of a Notice of Assessment of Civil Money Penalty issued by the Office of the Comptroller of the Currency (OCC) on October 25, 1985, and amended on December 5, 1985, and January 27, 1988 (hereinafter referred to collectively as Amended Notice). The Amended Notice sets forth alleged violations of ten Articles of the Order to Cease and Desist and the Amended Order to Cease and Desist which were issued to the Bank on June 29, 1983, and June 19, 1984, respectively (hereinafter referred to collectively as the Consent Order), and to which the Respondents stipulated.

The Amended Notice is based on the results of the January 31, 1985 examination, and on prior and subsequent examinations, of the Bank, which found substantial noncompliance with the Consent

Order. After taking into account the size of the financial resources and good faith of the Respondents, the gravity of the violations, the history of previous violations, and other matters as required by 12 U.S.C. SEC. 1818 (i)(2)(ii), the Amended Notice assessed Respondent Hedrick a CMP of fifteen thousand dollars ($15,000), and Respondents Abercrombie, Smith, Sloan, Eckel and Calloway a CMP of ten thousand dollars ($10,000) each. Director Smith settled with the OCC and is not a party to this action.

The Respondents filed an Answer and requested an administrative hearing pursuant to 12 U.S.C. SEC. 1818 (i)(2). The hearing in this case, originally scheduled for July 7, 1986, was postponed for nearly two years while the Respondents pursued court action seeking to enjoin the

OCC. The U.S. District Court for the Southern District of Indiana denied the Respondents' requested relief, holding that it had no jurisdiction to enjoin the OCC's actions. On November 12, 1987, the U.S. Court of Appeals for the Seventh Circuit affirmed the District Court's judgment. The Seventh Circuit did not rule on the merits of the Respondents' substantive arguments. See Abercrombie v. OCC, 833 F.2d 672 (7th Cir. 1987) ("Abercrombie"). A hearing was held on March 15-25, 1988, and June 21-22, 1988, in Cincinnati, Ohio, before the Honorable David G. Oringer, Administrative Law Judge (ALJ). The ALJ's Recommended Decision was filed on March 17, 1989. Following the filing of exceptions by the parties, the case was submitted to the Comptroller.

IV. Comptroller's Authority to Assess Civil Money Penalties.

This CMP action is brought under 12 U.S.C. SEC. 1818 (i)(2)(i), which provides in pertinent part:

> Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued pursuant to subsection (b), or (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues ...
> The penalty maybe assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

The CMP authority is one of several provisions enacted by Congress as part of the Financial Institutions Regulatory and

Interest Rate Control Act (FIRA), Pub. L. No. 95-630, 92 Stat. 3641 (1978), to strengthen the supervisory authority of the federal financial regulatory agencies over depository institutions. The authority to assess CMPs for violations of cease and desist orders was intended to give the regulatory agencies needed flexibility to ensure that financial institutions are operated in a safe and sound manner. Daily money penalties were adopted by Congress to serve as deterrents to violations of laws, rules, regulations, and orders of the agencies. H. Rep. No. 1383, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. code Cong. & Ad. news 9273, 9289.

V. Whether CMPs Can Be Assessed For Past Violations Of An Order To Cease And Desist

In both the Seventh circuit court of Appeals and in the subsequent administrative hearing, Respondents contended that CMPs cannot be assessed under SEC. 1818 (i)(2)(i) for violations that occurred prior to the Notice of Assessment dated October 25, 1985. Respondents note that SEC. 1818 (i)(2)(i) employs two verbs in the present tense, suggesting that wholly past violations not continuing to the date of the Notice of Assessment are beyond the reach of the Comptroller's authority to levy CMPs. R. Brief at 8-10; R. Reply Brief at 4-7. As articulated by the Seventh Circuit.

> The directors also argue that the Comptroller may impose CMP's only for violations of a cease and desist order that occur on and after the date of assessment, and not for past violations. The directors base their argument primarily on Sec. 1818 (i)(2)(i)'s present tense language: any director who "violates" a final cease and desist order "shall forfeit and pay

> a civil penalty ... for each day the violation continues." (Emphasis added.)

Abercrombie, 833 F2d at 676.

To support their interpretation of SEC. 1818 (i)(2)(i), Respondents rely on Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. _____, 108 S.Ct. 376 (1987), in which the Supreme court interpreted SEC. 505(a) of the Clean Water Act as not authorizing CMPs prompted by citizen suits alleging wholly past violations. R. Reply Brief at 5-7.

The Enforcement and Compliance Division (E&C) asserts that CMPs can be assessed for past, present and continuing violations of a cease and desist order. E&C stresses the legislative history of SEC. 1818 and the inapplicability of the Supreme Court's interpretation in Gwaltney. E&C Brief at 9-14.

1. The Recommended Decision

Following a thorough discussion, RD at 1093-114, the ALJ concluded that CMPs may be assessed for past violations. He stressed the legislative history of FIRA, pointing to the Congressional assertion that daily money penalties should serve as deterrents to violations of law, rules, regulations, and orders of the agencies, including final orders of the type for which the Amended Notice was issued in this case. RD at 108-109. He also noted that CMPs imposed by the FDIC under an almost identical statute were upheld in Fitzpatrick v. FDIC, 765 F.2d 569 (6th Cir. 1985), while acknowledging that the court did not directly address Respondents' "present tense" theory. RD at 113. The ALJ found that Gwaltney is not controlling precedent in this case.

He also rejected Respondents' argument that a Notice of Assessment is intended only to be a "due process warning" giving the recipient an opportunity to "cure" an admitted violation. rather, the ALJ viewed the Consent Order as a clear form of notice designed to impress upon Respondents the immediate need for change and the opportunity to cure. RD at 113-114.

2. The Comptroller's Decision

For several reasons, the Comptroller believes that SEC. 1818 (i)(2)(i) authorizes the imposition of CMPs for past, present, and continuing violations of a cease and desist order.

In authorizing CMPs, Congress' goal was two-fold: to discourage unsound practices and to make cease and desist orders self-enforceable, without constant monitoring

by regulators. As the Senate Committee Report explained:

> The civil money penalties provided in the bill are designed to be strong provisions of law. The provisions provide for the penalties to be assessed from the first day of the occurrence of any violation. Thus, the provisions should, to a significant extent, have a self-enforcing effect.
>
> ... In addition to these civil money penalty provisions, which should aid in prventing unsound or problem situations from arising, the bill provides that money penalties may be assessed against any institution or individual violating the terms of any cease-and-desist order. This latter civil money penalty provision should be particularly helpful in curing unsound or problem situations once they have arisen by requiring individuals and institutions to take orders issued by the regulatory agencies seriously, thereby resulting in the self-enforcement of orders. (Emphasis added.)

S. Rep. No. 323, 95th cong., 1st Sess. 8-9 (1977). See also H. Rep. No. 1383, 95th cong., 2d Sess. 17, reprinted in 1978 U.S. Code cong. & Ad. News 9273, 9289. Neither goal would be met by denying the

regulators the authority to impose CMP's for acts that terminated before a Notice could be issued. Moreover, institutions and individuals subject to an order will be less likely to change their conducts if they can violate the order repeatedly and then correct the violations when a Notice appears imminent. The Congressional emphasis was on the need to avoid violations and unsound practices in the first place through self-enforcement, not on the hasty correction of past violations to avoid a CMP.

Respondents' interpretation of SEC. 1818 (i)(2)(i) would impeded regulators' efforts to assure that banks operate safely and soundly and in compliance with law and regulation. The bank supervision process involves a combination of supervisory techniques, including visits

to the bank's premises and off-premises monitoring of reports generated by the bank and other sources. While supervision is ongoing,the regulator does not, except for the largest banks, maintain a permanent presence on the bank's premises. Therefore, violations may continue for a significant period before coming to an examiner's attention, particularly when insiders conceal their illegal actions. To permit a violation to go unpunished simply because an examiner has not discovered it and issued a Notice prior to its termination would likewise defeat the Congressional desire to deter violations.

Under Respondents' interpretation, a regulator could not impose a CMP on directors of an insolvent bank unless the Notice of Assessment was issued prior to the declaration of insolvency. We do not

believe that Congress intended to shield violators from a CMP simply because the regulator was unable to issue a Notice while the bank was still solvent.

It should also be noted that 1818 (i)(2)(i) contains an expansive definition of "violates":

> [T]he term "violates" includes without any limitation any action (alone or with another or others) for or toward, causing, bringing about, participating in, counseling, or aiding or abetting a violation. (Emphasis added.)

This broad language does not support a narrow reading of the preceding two sentences. If wholly past violations were to be excluded, Congress could have said so in this definition.

Finally, the Comptroller notes that SEC. 1818 (i)(2)(i) is the enforcement and penalty provision for cease and desist orders imposed under SEC. 1818 (b)(1)."

First State Bank of Wayne County v. FDIC, 770 F.2d 81, 83 (6th Cir. 1985) (citing numerous cases, including decisions reviewing cease and desist orders issued by the Comptroller of the Currency); see also Bank of Dixie v. FDIC, 766 F.2d 175, 178 (5th Cir., 1985)(rejecting the contention that the FDIC erred in failing to consider improvements made by bank), and U.S. v. W.T. Grant & Co., 345 U.S. 629, 633 (1953).

In conclusion, the Comptroller believes the present tense language in SEC. 1818 (i)(2)(i) was intended more to emphasize that daily penalties are being authorized than to exclude wholly past violations. Any other interpretation is inconsistent with what the Seventh Circuit described as "a penalty provision designed to punish and deter violations of cease and desist

orders." Abercrombie, 833 F.2d at 676. Additionally, the Comptroller believes that SEC. 1818 (i)(2)(i) clearly does not require that the OCC give Respondents time to cure their violations of the Consent Order. As the ALJ noted, the Consent Order itself was adequate notice to Respondents. RD at 114.

The Supreme Court's decision in Gwaltney does not support Respondents' interpretation of the present tense language in SEC. 1818(i)(2)(i). In Gwaltney, the Court held that SEC. 505(a) of the Clean Water Act does not confer federal jurisdiction over citizen suits for wholly past violations. According to the court, SEC. 505 suits were intended only to enjoin continuous or intermittent violations. Significantly, the Court distinguished between the permissible

scope of citizen actions and the authority of the EPA Administrator to seek civil money penalties. While citizens cannot sue under SEC. 505 to enjoin wholly past violations, the Administrator can impose CMPs for them. As the Court explained:

> (Section) 505(b)(1)(B)'s bar on citizen suits once a governmental enforcement action is underway suggests that the citizen suit is meant to supplement, not supplant, governmental action, which supplement role could be undermined if citizen suits for wholly past actions were permitted, since such suit might intrude upon governmental discretion to enforce the Act in the public interest.

98 L. Ed. 2d 306, 313. The Court continued:

> In contrast (to the Administrator's ability to seek CMPs), section 505 of the Act does not authorize civil penalties separately from injunctive relief; ...
>
> A comparison of SEC. 309 and SEC. 505 thus supports rather than refutes our conclusion that citizens, <u>unlike the Administrator</u>, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violations.

Id. at 318. (Emphasis added.)

Thus, the Court clearly indicated that the private citizen suit statute and the EPA's regulatory enforcement statute have different purposes. The Court never questioned the authority of the EPA Administrator to bring a CMP action for past violations, even though the EPS's CMP statute contains present tense language similar to 12 U.S.C. SEC 1818 (i)(2)(i). It is clear that the Comptroller would correlate with the EPA Administrator in any comparison of statutory authority. Therefore, Gwaltney does not refute our conclusion that the Comptroller has the authority to assess CMPs for past, present, and continuing violations of the Consent Order.

Finally, the Comptroller concludes that the CMP assessments were not legally

deficient, as Respondents allege, simply because the OCC failed to consider Respondents' intent or good faith. R. Brief at 9, 13; R. Reply Brief at 2. This issue has been firmly settled by the courts, which have held that for purposes of the CMP statute, "willfulness is not an essential element of the violation" and that "good faith goes only to the amount of the penalty," not to presence or absence of a violation. Fitzpatrick v. FDIC, 765 F.2d 569, 576, 578 (6th Cir. 1985). By its terms, SEC. 1818(i) does not include an intent or scienter requirement. This contrasts with the inclusion of a scienter requirement in 12 U.S.C. SEC. 93(a), which authorizes the forfeiture of a banking charter for "knowing violations" of law. The inclusion of a scienter requirement in

SEC. 93(a) and its exclusion from SEC. 1818(i)(2)(i) strongly suggests that Congress did not intend to include the scienter requirement in SEC. 1818(i)(2)(i). Sutherland Statutory Construction SEC. 51.02 (4th ed.)

VI. Comptroller's Decision: An Overview

The Amended Notice of Assessment alleges violations of ten Articles of the Consent Order. The ALJ's Recommended Decision concluded that Respondents violated eight of the ten Articles and recommended a CMP for each Respondent.

The Comptroller generally agrees with the ALJ's thorough analysis and reasoning in this proceeding which consumed ten volumes of transcript. In only two significant respects, the treatment of Article XII and the size of the CMPs, does the Comptroller differ from the ALJ's

recommendations, for reasons hereinafter explained.

The Comptroller specifically notes the ALJ's comments regretting the contentious nature of these proceedings. RD at 9-11 (meeting between Respondents and OCC staff); RD 126-127 and n. 31 (sweeping assertions in Respondents' Brief). While recognizing that hyperbole and charged language are not uncommon or unexpected in an adversarial setting, the Comptroller believes their use is unfortunate. However, like the ALJ, the Comptroller believes that these incidents did not bias the instant case against any party. RD 10-11.

The Comptroller agrees with E&C that Respondents confuse the issuance of the Notice with a final assessment decision made by the Comptroller. E&C Brief at 77.

The Notice is not a decisional document conveying a final order of assessment. Like allegations in a complaint, the allegations in the Notice and the relief or penalty proposed, if contested, must be established at trial, followed by the Comptroller's review and final decision. Moreover, the Notice can be amended, as was done in this case, if more details are needed to inform Respondents fully of the nature of the charges. According to E&C's Brief at 78, the ALJ ruled that unless the original Notice was amended, evidence from prior and subsequent examinations would not be admitted. The Comptroller believes the ALJ's ruling was correct and that the expanded list of examinations cited in the Amended Notice dated January 27, 1988, adequately informed Respondents of the scope of E&C's allegations.

In summary, the Comptroller finds that the Amended Notice gave Respondents "a reasonable opportunity to know the claims of the opposing party and to meet them." Morgan v. U.S., 304 U.S. 1, 18 (1983); Aloha Airlines v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979). Respondents not only "understood the issue", Aloha Airlines at 262, but presented testimony on the evidence compiled in examinations before and after January 1985.

VII. Alleged Violations of the Consent Order

Article I

Article I of the Consent Order required the Bank's Board of Directors to appoint a Compliance Committee and to submit to the OCC district office progress reports every sixty days detailing actions taken to comply with the Consent Order.

Respondents stipulated that at the time of the January 1985 examination, only two sixty-day reports (dated August 27, 1983, and September 20, 1983) had been submitted. RD at 20; R-32; R-33; TR. Vol. 1 at 108. According to E&C, nine such reports should have been made. E&C Brief at 17. Respondents argued that OCC "waived" the requirement for reports due in 1984 by failing in National Bank Examiner Johnson's two Reports of Examination that year to cite the Bank as in violation of Article I.

1. The Recommended Decision

The ALJ concluded that Respondents violated Article I by failing to submit the 60-day reports from January 1984 until the January 1985 examination. The ALJ rejected Respondents' argument that National Bank Examiner Johnson's failure

to cite Article I as a violation constitutes a waiver of the reporting requirements. RD at 22-26. Respondents have excepted to the ALJ's finding. R. Exceptions at 17-21.

2. The Comptroller's Decision

The Comptroller agrees with the ALJ and finds his discussion fully dispositive of the issue. The language of Article I plainly requires the filing of reports by the Compliance Committee every sixty days. Moreover, supplemental letters to the Board accompanying the January 1984 and June 1984 Reports of Examination emphasized the need to continue submitting "periodic progress as previously instructed." RD at 22. National Bank Examiner Johnson's actions thus did not "waive" the report requirement, nor did they mislead the Respondents.

While determining that Respondents violated Article I, the Comptroller notes the ALJ's finding that this noncompliance ceased by the September 1985 examination bears on their good faith and should be considered in assessing the civil money penalty.

Article III

Article III, paragraph (4) required the board to implement a program to eliminate classified assets cited in the December 1982 Report of Examination, and to make monthly reports ("30-day reports") to the OCC district office on the status of each criticized asset exceeding $50,000. Paragraph (5) of the Article prohibited the extension of additional credit "to any borrower whose extension of credit is criticized, in whole or in part, in the Report of Examination, as long as such

credit remains criticized, and in aggregate exceeds $50,000." Paragraph (6) provides an exception to the prohibition in paragraph (5); an extension of credit to these borrowers is permitted if:

> (a) Failure to make such extension of credit would be substantially detrimental to the best interests of the Bank;
>
> (b) The Board, or its designated committee, executes a detailed, written statement of the reasons why failure to make such extension of credit would be substantially detrimental to the best interests of the Bank; and
>
> (c) Such statement is retained in the credit file of the affected borrower.

E&C does not dispute that Respondents were in compliance with the 30-day report requirement of paragraph (4). RD at 31. Rather, E&C contends that the bank violated paragraph (5) by making additional extensions of credit without executing the detailed written statement

("certification") required by paragraph (6)(b) and without including the certification in the borrower's credit file as required by paragraph (6)(c). According to E&C, these violations were revealed during the January and June 1984 examinations, the January and September 1985 examinations, and the September 1986 examination.

1. The Recommended Decision

The ALJ determined that the additional extensions of credit to three separate borrowers (Berkemeier, Coon and Rosenbaum) identified in the January 1985 examination did not come within exceptions authorized by paragraph (6) and were therefore made in violation of paragraph (5). RD at 30-31. Additionally, the ALJ found that these violations continued even after the October 1985 Notice of Assessment;

specifically, the September 1986 examination noted fourteen new loans that had been extended to eight criticized borrowers. RD at 28, 31. The ALJ expressly rejected Respondents' assertion that their compliance with the 30-day report requirement of paragraph (4) was an adequate substitute for the certification and filing requirements of paragraph (6). Respondents excepted to the ALJ's conclusions. R.Exceptions at 21 et seq.

2. The Comptroller's Decision

The Comptroller agrees with the ALJ and adopts his analysis. Paragraph (6) contemplates (a) that the Board deliberate are fully before extending new credit to criticized borrowers and set down its rationale in writing, and (b) that a copy be placed in the borrower's credit file. The Respondents appear to concede that the

first step was not undertaken for borrowers Rosenbaum, Coon, and Berkemeier. R. Exceptions at 21. Rather, Respondents assert that OCC was too "busy looking for multiple photocopies to be placed in multiple locations in the bank" while ignoring a recovery on the Rosenbaum loan. R. Exceptions at 24. As the ALJ points out, the recovery was made after (rather than before) the new advance to Rosenbaum, and prudent banking practice to include in the borrower's credit file all relevant documentation. Without a complete credit file, the bank's own officers and directors cannot adequately assess the loan's status.

The Comptroller agrees with the ALJ that the 14 extensions of credit identified in the September 1986 examination as not in compliance with

Paragraph (6) are evidence of the Respondents' "disregard of the requirements of this provision of the cease and desist order even after the Respondents' receipt of the Notice of Civil Money Penalties." RD at 31.

Article IV

Article IV required the Bank to review and amend its written lending policies to include seven specified factors ("a" through "g").[1] Article IV also provided,

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[1]Factors (1) through (g) were:
(a) the circumstances and required approval for extensions or renewals of loans, including overdrafts;
(b) a definition of the bank's customary trade area appropriate to the lending capacity, expertise and profitability of the bank;
(c) the circumstances under which loans will be granted to borrowers outside the Bank's customary trade area, including procedures to supervise those out of area loans;
(c) the circumstances under which loans will be granted to borrowers outside the Bank's customary trade area, including procedures to supervise those out of area

"The lending policy shall e adhered to by the Bank in the course of all its lending activities."

E&C contends that while the Bank adopted the revised loan policy in September 1983, the January 1985 examination and subsequent examinations show that the Bank failed to adhere to it. RD at 32. Separately, E&C asserts that a new loan policy adopted in May 1985 failed

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loans;
(e) establishment and maintenance of properly documented credit files throughout the life of loans;
(f) guidelines for analyzing the financial status and repayment capacity of borrowers or prospective borrowers relative to the type, amount, and purpose of the loan and the source and terms of repayment and collateral requirements; and
(g) guidelines for and circumstances under which loans shall be made to insiders and their interests, including documentation of credit and collateral, credit worthiness, BOARD approval, and compliance with applicable law and regulation.

to address specific areas required by the Consent Order, and that the Bank failed to adhere even to this deficient loan policy. RD at 41.

1. The Recommended Decision

The ALJ found the Respondents in violation of the provisions of the Bank's own loan policy that addressed factors (a), (b), (c) and (d) of Article IV. RD at 44. The ALJ elected to postpone until Article VI a discussion of alleged violations of factors (e) and (f) because the facts giving rise to these alleged Article IV violations are identical to those giving rise to alleged violations of Article VI. RD at 41, 44.

2. The Comptroller's Decision

The Comptroller concurs with the ALJ's analysis and conclusions in their entirety. RD at 32-44. Respondents'

Exceptions simply reargue whether the Bank's ability to make loans, or provide maturity extensions thereto, should be constrained by a formal lending policy, when in their view the loans or extensions in question were consistent with sound banking. R. Exceptions at 24-25. The ALJ correctly addressed this point, noting that the Bank's loan policy is binding on the Bank because it is effectively incorporated into the Consent Order, which requires that the "lending policy shall adhered to by the Bank in the course of all its lending activities." RD at 34-35. Thus, when in 32 instances variations were made from the Bank's loan policy on maturity extensions without the loan committee's approval, the ALJ is justified in finding a violation and the Comptroller

is justified in assessing a CMP, whether the extensions were sound or not.

Respondents also contend that OCC examiners made "many mistakes" in listing in the January 1985 examination report certain loans as outside the trade area defined in the Bank's loan policy, as required by factors (b) and (c). R. Exceptions at 25. The ALJ agreed that the examiners erroneously listed six loans, RD at 35-37, and the Comptroller concurs. However, as the ALJ noted, subtracting these improperly listed loans (about $351,457) from the total amount of out-of-area loans ($3,659,983) still leaves more than three million dollars in such loans, which substantially exceeds the two-million-dollar maximum prescribed by the Bank's loan policy. RD at 37-38. Thus, a finding of a violation is warranted

because Respondents failed to adhere to this aspect of their loan policy.

Respondents also object to the ALJ's findings of violations stemming from examinations following the January 1985 examination. For example, the ALJ found that the Bank's new loan policy adopted in May 1985 failed to address specific areas required by Article IV of the Consent Order, a matter first noted in the September 1985 examination. R. Exceptions at 25-28; RD at 41, 44. As discussed earlier in section VI of this Decision, Respondents were given adequate notice of the scope of E&C's evidence in the Amended Notice dated January 27, 1988. Accordingly, the Comptroller will consider the post-January 1985 violations as well in assessing an appropriate CMP.

Article VI

The relevant paragraphs of Article VI concern (a) credit information deficiencies and (b) collateral documentation deficiencies. Specifically, paragraph (9) required the Bank to correct all credit information deficiencies cited in the December 1982 examination report, and it prohibited the Bank from granting or renewing any loans without first obtaining and analyzing current and satisfactory credit information. In a similar vein, paragraph (10) requires the Bank to correct all collateral documentation exceptions cited in the same examination report, and it prohibits the Bank from granting any secured loans "unless collateral is fully documented and security interests are perfected, or perfection is assured."

1. The Recommended Decision on Paragraph (9)

With respect to paragraph 9, the ALJ found that the Bank committed numerous violations as evidence by examinations from 1983 through 1987. RD at 56. Specifically, he agreed with E&C's allegations that examinations in August 1983, January 1984, and June 1984 identified violations of paragraph (9), including a failure to correct credit information exceptions listed in the 1982 examination (corrections that are expressly required by the opening clause of paragraph (9)). RD at 45-48. The ALJ analyzed each of the 25 loans cited in the January 1985 examination and concluded that E&C had proved a violation on 22. RD at 48-53. He also found violations in paragraph (9) in the 16 credit information

exceptions identified in the September 1985 examination, in the 32 new loans identified in the September 1986 examination without first obtaining complete credit information, and in the 79 loans identified in the October 1987 examination and in the Bank's failure to correct five exceptions cited in the previous (September 1986) examination. RD at 53-55.

2. The Comptroller's Decision on Paragraph (9)

The Comptroller generally adopts the ALJ's analysis and conclusions with respect to paragraph (9). That four violations cited in the December 1982 examination (specifically, the loans to Beckner, Deci-Ma Corp., A.F. & V. Investment Company, and E.L. J. Corp.) had still not been corrected at the time of

the January 1985 examination is disturbing. Compare RD at 49-53 (#3,11,13,16) with OCC Ex. 3, Art. VI, pp. 1-6. The Bank's practice of extending additional credit without current and satisfactory credit information, even after the issuance in October 1985 of the Notice of Assessment, also displays a disregard of the Consent Order and a failure to observe prudent banking practices.

Respondents complain that nothing in the Consent Order requires the Bank to document the loan file in instances when the borrower refuses to supply a financial statement or where by reason of litigation or the borrower's bankruptcy a financial statement is difficult to obtain. R. Exceptions at 28-29. Respondents are simply rearguing a point adequately

addressed by the ALJ. RD at 55-56. The Comptroller would add only that, in the case of loans for which a borrower failed to update an earlier financial statement and the Bank neglected to document the loan file on its attempts to secure a current statement, a violation of the Consent Order is established, but it is more properly a violation of Article IV(e) [maintaining documented loan files] rather than of Article VI, paragraph (9) [granting loans without obtaining satisfactory credit information].[2] Under Article IV(e), the Bank's loan policy was to provide for "Establishment and

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[2] A number of such instances are apparent in the 25 loans cited in the January 1985 examination and described in detail at RD 49-53. See, e.g., T.E. Elliott Trucking Inc. (#7), William Wildman (#10), and Benchmark Investments and Development Corp. (#4).

maintenance of properly documented credit files throughout the life of loans." The Bank did indeed adopt a loan policy calling for proper file maintenance. RD at 39; OCC Ex. 3, Article IV, p.4. In the Comptroller's view, if a borrower refused to give financial information to the Bank, the Bank's loan policy should be interpreted as requiring the Bank to send a written request to the borrower for such information and to place a copy of the request in the borrower's loan file. RD at 56. If the borrower is in bankruptcy or in litigation, the loan file should reflect this. Article IV(e) and the Bank's own loan policy contemplate that each loan file must be maintained in an up-to-date fashion for the benefit of the Bank's officers and directors, who must

study the loan file to determine the borrower's capacity to pay.

In summary, the Comptroller rejects Respondents' contention that the "impossibility" of obtaining a current financial statement excuses the Bank from documenting the loan file to reflect the loan's current status. The Comptroller will regard such instances as violations of Article IV(e) rather than of Article VI, paragraph (9). In all other respects, the Comptroller agrees with the ALJ's conclusion that the Bank was in violation of Article VI, paragraph (9) as a result of examinations from 1983 through 1987. RD at 56.

3. The Recommended Decision on Paragraph (10)

As noted earlier, paragraph (10) of Article VI required the Bank to correct

collateral documentation deficiencies cited in the 1982 examination. Additionally, the Bank "shall not grant any secured loans unless collateral is fully documented and security interests are perfected, or perfection is assured.

The focus of the hearing was on the bank's failure to obtain, and maintain in the borrower's credit file, a "final" title search, but it was performed a week or two prior to the loan closing, and therefore the credit file failed to reflect whether any liens had been placed between the date of the "preliminary" title search and the closing. Tr. Vol VII at 186. E&C's witnesses argued that to satisfy paragraph (10) either title insurance or a final title opinion or search bridging the gap was needed. RD at 60, 61; Tr. Vol 5 at 170. The August 1983

examination noted 17 loans as collateral exceptions; the January 1984 examination noted 13; the June 1984 examination revealed 15; and the January 1985 examination noted 13. RD at 61-62.

The ALJ concluded that the evidence was sufficient to show that Respondents violated paragraph (10) with respect to the June 1984 and January 1985 examinations. RD at 67. Respondents except, arguing that the bank was following the legal advice of its attorney, Mr. Eder, who testified that other small banks in Indiana did not obtain a "final" title search. R. Exceptions at 29-30.

4. The Comptrollers's Decision

The Comptroller adopts the ALJ's analysis and conclusion that the Respondents violated paragraph (10) in

multiple instances cited in the June 1984 and January 1985 examinations. Specifically, the Bank's practice of obtaining only a preliminary title search or abstract or attorney's opinion, dated prior to the loan closing, is a violation of paragraph (10). The Comptroller agrees with the ALJ that the requirements of paragraph (10) supercede the practice of small banks in the area as described by Mr. Eder. RD at 65-67. As the ALJ notes, the Comptroller, though the Consent Order has undertaken to regulate certain aspects of the bank's procedures for making secured loans and for documenting the collateral and perfecting the bank's security interest. Thus, the stricter requirements of the Consent Order supplant alleged general practice. Moreover, attorney Eder was not advising the Bank on

how to comply with paragraph (10) and therefore his testimony as to local practice and Indiana law is of little import. Additionally, Eder's testimony was effectively refuted by Examiner Lyle, who testified that final title searches are a common banking practice and not unknown even at Rushville National Bank. RD at 62.

Beyond those considerations, it is also important as the ALJ observed, that during the 1984 examinations the Bank was warned that its final lien position must be fully documented. RD at 61, 67. For example, the June 1984 examination report noted: "Correction is also needed in several loans lacking complete documentation (primarily final title insurance/opinion) and satisfactory credit information."; OCC Ex. 9, p. 6.

Finally, the Comptroller agrees with the ALJ that these violations of Article VI, paragraph (10) must also be considered violations of Article IV(e), which required the bank's loan policy to provide for the "establishment and maintenance of properly documented credit files throughout the life of loans." Although Respondents' Exceptions do not criticize this "double counting," the Comptroller agrees with the ALJ, RD at 67, that the assessment of a CMP should take into account that the violations of paragraph (10) arise out of the same facts as the violations of Article IV(e).

Article VII

Article VII of the Consent Order required the Board to:

> . . . review and revise the Bank's internal loan review system to provide for a monthly review of the Bank's loan portfolio for the purpose of assuring

> the timely identification and grading of all problem credits.

The Article also required the Board to review the effectiveness of the system periodically. Periodic reports were to be provided for the Board's review focusing on six areas, including the overall quality of the loan portfolio; the identification by type, name, and amount of the problem and delinquent loans; the identification of credit collateral documentation exceptions; the identification and status of violations of law, rule, or regulation; and the identification of loans not in conformance with the Bank's lending policy. The Board was required to review the monthly reports and take remedial action.

E&C alleges that the Bank was in noncompliance with Article VII beginning

with the June 1984 examination and extending through the October 1987 examination. E&C Brief at 51. The ALJ concluded that Respondents violated Article VI as evidence by the January 1985, September 1986, and October 1987 examinations. RD at 76.

Respondents' Exceptions focus on (1) the ALJ's findings that the "1 through 5" system used by the Bank to grade the quality of its loans was inadequate; (2) the ALJ's apparent finding that a single loan, the Coers loan, which was one of significant number of problem loans that the Bank's loan review system failed to identify, was properly classified as "substandard"; and (3) the inclusion of evidence from examination after January 1985.

The Comptroller adopts the ALJ's analysis and conclusions. Respondents' Exceptions are discussed below.

1. The grading system

The ALJ found that at the June 1984 examination the Bank was warned that it was not in compliance with the internal loan review requirements of Article VII, RD at 68-69, and Respondents' Exceptions do not challenge this finding. Subsequently, and apparently at the oral suggestion of an OCC examiner, the Bank implemented a system of grading loans from "1" to "5" in order of descending quality. The number, or grade, was to be marked in the corner of the note. RD at 69.

While it was clear that a "1" was a "good" rating and a "5" denoted a "write-off" or "loss", the Bank failed to describe the meaning of each grade. Thus,

at the January 1985 examination, the Bank was told that without an articulation of the meaning of each grade, the grading system could not adequately describe the quality of the loan portfolio or identify in a timely fashion problem loans that might result in a loss to the Bank. OCC Ex. 1, p. 6; Tr. Vol. II at 52-58. In addition to finding no substance to these numbers, the examiners concluded that Bank personnel did not understand the system and that only grader possessed this subjective knowledge. RD at 69-70; Tr. Vol. IV at 95. The examiners also noted other deficiencies, not contested in respondents' Exceptions, such as the absence of reports to the Board concentrating on the six specific areas required by Article VII. RD at 70.

Respondents' Exceptions complain that the January 1985 examination represented OCC's first opportunity to review the new grading system and that Examiner Lyle's "personal belief that more detail is desirable is simply not an issue that is proper basis for Civil Money Penalties." Respondents assert that they should have been given an "opportunity to cure" this deficiency. R. Exceptions at 30-31.

The Comptroller agrees with the ALJ that the "1 through 5" system was inadequate in substance and quality. RD at 76. Further, the Bank had ample opportunity since the entry of the Consent Order in 1983 to seek whatever advice was needed (e.g., advice from correspondent banks, bank trade associations or consultants) to assure an adequate loan review system before January 1985. The

Bank was even warned about its noncompliance in June 1984. Moreover, it is completely unwarranted for the Respondents to expect OCC's examiners to construct and entire loan review system for them. It is the directors' job to direct, and when the Bank is subject to a Consent Order, it is the directors' job to assure compliance. OCC examiners can provide suggestions, but they are authorized to direct the Bank.

Even if the Comptroller were to agree that the "1 to 5" grading system complies with Article VII, numerous other bases for a CMP were established. For example, the January 1985 examination disclosed that the reports to the Board failed to concentrate on the six areas specified in the Article. The reports also failed to include the identification of an

information on loans not conforming to the Bank's loan policy. RD at 70. Additional bases for violations involving specific loans are described below.

2. The Coers loan

In the January 1985 examination, the examiners classified 12 loans as substandard or worse which the Bank's internal loan review system had failed to identify as problem loans. RD at 70-71. Both at trial and in their Exceptions, Respondents contest the substandard classification of only one of these loans, the Coers loan, thereby conceding that the Bank's loan review system was ineffective for the other eleven loans. Thus, irrespective of the Coers loan, the Respondents violated Article VII's requirement that the Bank's internal loan review system assure "the timely

identification and grading of all problem credits." RD at 73.

Nevertheless, the Comptroller will address the classification of the Coers loan, inasmuch as there is some ambiguity about the ALJ's final conclusion and because both parties continue to debate the matter in their Exceptions.

The Coers loan was for $56,000 and was secured by farm land valued at $112,000, which Examiner Lyle deemed adequate collateral. RD at 72; Tr. Vol. IV at 105. Respondent assert that the loan was "well secured debt" as defined by 12 C.F.R. 7.6125. However, Examiner Lyle testified that the mortgage had been twice extended even though the annual interest had not been paid. Tr. Vol. IV at 106. The unpaid interest was added to the loan. The examiners concluded that a substandard

classification was warranted because Coers lacked paying capacity in general and repayment was dependent on liquidation of the collateral. Tr. Vol IV at 106-107. The debt was ultimately recovered in full. RD at 72; R. Exceptions at 31, 33.

In the Comptroller's view, the Coers loan was correctly classified as substandard based on the facts known at the January 1985 examination. Indeed, this loan is a typical example of a substandard loan, which is a loan for which either the borrower's paying capacity or current worth or the collateral is inadequate. Comptroller's Handbook for National Bank Examiners SEC. 215.1. Here, the borrow's paying capacity was plainly deficient, notwithstanding the well secured nature of the loan. Thus, the Coers loan must be included with the

11 other loans identified at the January 1985 examination as evidence of an inadequate loan review system violating Article VII.

3. Evidence from subsequent examinations

Respondents also object to the ALJ's consideration of evidence from examinations subsequent to the January 1985 examination. R.Exceptions at 36-37. The ALJ noted that at the September 1986 examination the Bank's internal loan review system was again found to be ineffective and unreliable because it failed to identify nine classified loans and two other loans especially mentioned. Moreover, the Bank's system gave improper risk classifications to six other loans and failed to note noncompliance with Bank policy, violations of law and regulations,

and credit and collateral exceptions. RD at 74. Much the same criticism was made at the 1987 examination, with the only new twist being that the Bank's loan review group was found to have ignored all loans recently approved by the Board on the assumption that they must be "good" loans. Some of these loans were classified or criticized by the examiners. RD at 75.

For reasons given earlier in section VI of this Decision, the Comptroller concludes that evidence from examinations after the January 1985 examination should be considered in determining whether Respondents violated Article VII and the amount of any CMP.

In conclusion, the Comptroller adopts the ALJ's findings and conclusions with respect to Respondents' violation of Article VII. RD at 76.

Article IX

Article IX of the Consent Order requires the Board to review the adequacy of the Bank's Allowance for Possible Loan and Lease Losses (Allowance) on at least a quarterly basis and to establish a program for the maintenance of an adequate Allowance. This review and program must focus on specific factors: loan loss experience; an estimate of potential loss exposure on each significant credit; trends of delinquent and non-accrual loans; general economic conditions prevailing at the time of review; loans criticized by national bank examiners; and (problem) loans identified by the Bank's internal loan review system. It also requires that any deficiency in the Allowance be remedied in the quarter it was discovered. Additionally "written

documentation shall be maintained indicating the factors considered and conclusions reached by the Board in determining the adequacy of the Allowance."

1. Alleged Violations and Factual Background

The Allowance is a capital reserve account created to cover existing or potential losses in a bank's portfolio. One of the factors critical to ensuring and adequate Allowance is a bank's system for identifying problem loans and loans classified as "loss" which must be "charged off" or deducted from the Allowance. Assets classified "loss" are considered uncollectible and of such little value that they are not longer bankable assets. See Comptroller's

Handbook for National Bank Examiners, SEC. 215.1.

E&C alleges that violations of Article IX were found at the January 1985, September 1985, and September 1986 examinations in that the Bank failed to maintain a sufficient balance in the Allowance to cover loan losses identified during the examinations. RD at 77. At the January 1985 examination, losses of $642,191 were identified, of which $500,000 was directed to be charged against the Allowance. This left a negative balance of $418,000. TR. Vol. II at 73. The examiners concluded that, "the failure...to recognize existing losses in under-collateralized loans and the absence of a meaningful loan review system has negated the effectiveness of the (Allowance) evaluation process." OCC

Ex. 1 at 9. At later examinations, in addition to an inadequate Allowance, the Bank failed to document the factors considered in its analysis. Tr. Vol. VI at 106-107; RD at 83.

At trial, Respondents disputed OCC's classification of the $245,000 loan to Richard McCool as a loss because Respondent Hedrick was sure that the loan would be repaid. Tr. Vol. VIII at 41-42. Respondents allege that there was adequate collateral to support the loan since Hedrick had agreed to substitute for McCool as a general partner in a real estate project (Princeton Manor Apartments), and had assigned his (Hedrick's) interest in the project to the Bank for repayment of McCool's debt. RD at 79-80; Tr. Vol. VIII at 50. The examiners classified the McCool loan as a

loss because there were not documents or other evidence to substantiate the existence of the collateral. RD at 80. The Bank "re-booked" the McCool loan based on an approved settlement with the bankruptcy court, but it was not until October 1987 that the Bank recovered $140,000 of that loan. Tr. Vol. VIII at 145. The McCool loan resulted in a partial loss to the Bank of approximately $55,000. RD at 80; Tr. Vol. VI at 177.

2. The Recommended Decision

The ALJ rejected the Respondents' argument that they were not told that their system to determine the Allowance was unsound. He concluded that the Respondents should have known from the results of examination reports which indicated the need to make major changes to their program to maintain an adequate

Allowance. RD at 83. He also rejected the Respondents' other arguments: that subsequent recovery on the McMool loan demonstrates that it should not have been charged off; and that directors' subjective decisions concerning the Allowance and calculation of loan losses is protected by the "business judgment" rule. RD at 81, 83. The ALJ concluded that the Respondents had violated Article IX for failing to maintain an adequate Allowance, but noted the Respondents' efforts to "cure" this noncompliance by improving their system for determining the Allowance. In the ALJ's view, such good faith efforts should be considered in establishing the amount of the CMP. RD at 84.

3. Exceptions of the Parties

The Respondents except, arguing that the Notice of Assessment was based on the January 1985 examination but that the ALJ had relied on other examinations without specifying which was the basis of the violation; that the ALJ erred in finding that recoveries were irrelevant to whether the loans in question should have been charged off; and that in view of the ALJ's findings of Respondents' good faith efforts to "cure" past violations, there was no basis for finding a violation. R. Exceptions at 37-40.

E&C excepts to the ALJ's reference to the Respondents' "good faith" efforts to comply with their loan review system, alleging such efforts were minimal at best. E&C also notes that the ALJ's Recommended Decision is unclear as to whether the OCC had properly classified

the McMool loan as a loss to be charged off; if he found it was improperly classified, they except, citing examiner deference in such matters. E&C Exceptions at 16-19.

4. The Comptroller's Decision

The Comptroller believes that the appropriate standard for determining the adequacy of the Allowance is whether it fairly and reasonably represents the loss of potential in a bank's loan portfolio, i.e., whether it will absorb the actual and potential losses. OCC's policy governing the establishment of the Allowance, indicates that it is the responsibility of bank management and the board of directors to determine the adequacy of the Allowance. They must establish written policies and procedures to evaluate the risk to the portfolio,

ensure the timely charge-off of loans and properly reflect estimated future losses in the Allowance. BC-201 makes clear that failure to maintain an adequate Allowance, or to properly document the methodology used to determine its adequacy, may constitute an unsafe and unsound banking practice.

The Comptroller concurs with the ALJ that the Respondents failed to maintain the Allowance at an adequate level at the January 1985 examination and therefore violated Article IX of the Consent Order. The Bank's Allowance was not sufficient to absorb the actual losses, to say nothing of providing for future losses. As noted earlier, the examiners found sufficient losses to warrant charging off $550,000 against an Allowance that totalled $418,000 at the time. RD at 77-78. Of

course, the charge-off of the entire $245,000 McMool loan was crucial in determining the Allowance's insufficiency. While the Respondents' Exceptions make no express reference to the McMool loan or its charge-off, the Comptroller feels compelled to say that he agrees with the examiners' decision to declare this loan a loss. An examiner's classification of loans is entitled to deference unless it lacks an objective factual basis or its arbitrary and capricious. See Sunshine State Bank v. FDIC, 783 F.2d 1580, 1583 (11th Cir. 1986).

The McMool loan had been classified by OCC examiners since 1979 and was considered substandard at each examination since August 1983. Tr. Vol. II at 76-77 and OCC Exhibits 7-9. In January 1985 the loan had been past due since June 1984 and

McCool had declared bankruptcy. No reduction in principal had been made, and papers filed in bankruptcy court listed the Bank as an unsecured creditor. Tr. Vol. II at 79. No repayment program had materialized, and documentation was nonexistent. Tr. Vol. II at 80-81. This loan was clearly not a bankable asset based on what was known at the January 1985 examination. The examiner's decision to classify this loan substandard is therefore grounded in an objective factual basis.

The Comptroller agrees that at the September 1985 examination the Allowance once again was inadequate and the Bank was required to make an additional provision of $240,000 to bring the reserve back up to an acceptable level to cover losses. Moreover, NBE Lyle testified that the Bank

continued to give no consideration to problem loans identified by its internal loan review system, in its analysis of the Allowance. Tr. Vol. II at 201-203. The record also shows that even at the September 1986 examination, the Respondents' analysis to determine an adequate Allowance was faulty, requiring an additional $85,000 to balance the reserve. RD at 82-82; Tr. Vol. VI at 106. In addition, Respondents failed to document the factors considered in their analysis. Tr. Vol. IX at 107. The examiners discussed these violations with the Respondents on numerous occasions during the examinations. The Comptroller concludes, therefore, that the Respondents demonstrated a continuing disregard for the requirements of Article IX of the Consent Order. At the same time, the

Comptroller acknowledges that by September 1986 a new, more refined system for computing the Allowance had been developed. RD at 83. This belated effort shows a modicum of good faith to offset partially Respondents' violation of Article IX.

Finally, notwithstanding the Respondents' Exception, the Comptroller agrees with the ALJ that any future recoveries to the Bank have no bearing on whether a particular loan should have been classified as a loss to be charged off. RD at 83. As the ALJ noted, the argument that a subsequent recovery demonstrates the error of charging the loan off is a post-hoc judgment of the loan's quality. A charge-off decision must be made without the benefit of subsequent knowledge. Recoveries are not common in banking, and

it is well understood that they do not invalidate prior charge-off decisions. In the case of the McCool loan (the only charge-off disputed by the Respondents), a $140,000 recovery was not made until October 1987, almost three years after the charge-off. Even then, the Bank sustained a $50,000 loss, a loss that may increase if the loan as subsequently restructured is not prepaid in full. RD at 82; Tr. Vol. VI at 175-177.

Article XII

Article XII of the Consent Order requires the Board of Directors to prepare a detailed written program to improve and sustain earning of the Bank, including annual budgets, projected balance sheets, year-end income statements, and a description of operating assumptions that form the basis for, and adequately

support, major projected income and expenses. These budgets and related documents were to be submitted annually to the district office "on or before January 31" for each year after 1983.

1. Alleged Violation and Factual Background

E&C alleges that although the income statement was submitted as required on January 31, 1985, the Board failed to submit a projected balance sheet or a description of operating assumptions. RD at 84; Tr. Vol. II at 87. When reminded of this at the examination, President Eckel stated that the missing information would be submitted within 30 days. Tr. Vol. II at 93-94; OCC Ex-1 at 15. However, it was not sent until April 2, 1985, and the district office did not

receive the data until April 18, 1985. Tr. Vol. VII at 225-226; Tr. Vol. at 89.

The Respondents contend that a handwritten pencil draft of the balance sheet and assumptions prepared by cashier William Carpenter was shown to NBE Lyle during the January 1985 examination. RD at 85; Tr. Vol. VII at 141, 149; R. Ex. 6. Respondent Eckel testified that this handwritten draft was not sent to the district office on time because the Bank was awaiting details of a proposed capital forbearance program that would affect the amortization of agricultural loans. RD at 85; Tr. Vol. VII at 142, 143; Tr. Vol. IX at 175. Respondents allege they were concerned about the large number of agriculture-related loans at the Bank and wanted to include them in the budget. Tr. Vol. IX at 175, 183. NBE Lyle testified

that he did not recall having been shown the handwritten draft at the January 1985 examination, but that had he seen it, if the assumptions were valid, he may not have found the Bank in noncompliance. RD at 86; Tr. Vol. II at 93; Tr. Vol. III at 78-79.

2. The Recommended Decision

Noting Lyle's testimony described above, the ALJ held that because NBE Lyle "could not attest to his experience with these handwritten documents, there is not enough weight in his testimony to find Respondent Directors in violation of Article XII. Even had the Respondents been found in noncompliance of this article, its significance would have been de minimus [sic]." RD at 86.

3. Exceptions of the Parties

Despite the ALJ's finding that they did not violate Article XII, the Respondents except, arguing that the Enforcement & Review Committee was erroneously told, in an internal memo on which it relied to decide to assess CMPs, that no budgets were filed for 1983 and 1984. They assert that the ALJ improperly allowed this charge to be litigated. R. Exceptions at 40-41.

E&C excepts to the ALJ's conclusion that the Respondents did not violate Article XII and his characterization of the alleged violation as de minimis. They contend that any reliance by the Respondents on an anticipated change in the OCC's policy related Agricultural credits is unjustified, and does not alter the fact that they knew the requirements

of the Consent Order and failed to comply with them. E&C Exceptions at 19-21.

4. The Comptroller's Decision

The Comptroller disagrees with the ALJ's conclusion that the Respondents did not violate Article XII and that, even if a violation had occurred, it would be de minimis

The evidence establishes that Respondents failed to submit a projected balance sheet or a description of operating assumptions to the district office on or before January 31, 1985, as required by Article XII of the Consent Order. Specifically, the January 1985 Report of Examination, a contemporaneous document entitled to some weight, states that while such information was provided for 1983 and 1984, the data for 1985 did not include a projected balance sheet or

a description of operating assumptions. OCC Ex. 1, p. 15. Moreover, the same Report of Examination shows that when this violation was discussed with bank officials during the examination, President Eckel promised that the missing information would be submitted to the district office within 30 days. Id. This documentary evidence was confirmed as to both points in testimony by National Bank Examiner Lyle. Tr. Vol. II at 87, 93. Respondents' evidence does not controvert E&C's proof; even if showing Cashier Carpenter's handwritten data to Mr. Lyle during the on-site examination was equivalent to sending it to the district office, this did not take place until well after the January 31 date specified in Article XII. This episode could not have occurred before February 19, 1985, when

the Bank finally submitted the data to the district office in April, the operating assumptions were found to be insufficiently detailed, causing the district office to write the bank for a "thorough explanation" of their rationale. OCC Ex. 3, Art. XII (letter dated May 7, 1985, to the Bank's Board from Robert W. Hefner).

Respondents' explanation for not submitting the required data on time--that they had heard "talk" and "rumblings" of a possible change in policy on the amortization of agricultural loans (Tr. Vol. 7 at 148-149; Vol. 9 at 175) confirms that the requirements of Article XII were violated. Further, it is widely accepted that the Bank cannot unilaterally decide to change the terms of the Consent Order.

For these reasons, the Comptroller finds that E&C has met its burden of proof that the Respondents violated Article XII, from January 31 to at least April 2, 1985. The delay in submitting this document was deliberate and protracted. In the Comptroller's opinion, it is not a de minimis violation of the Consent Order.

Article XVI

Article XVI of the Consent Order requires the Board to adopt a written policy to improve control over the expense accounts of directors and officers and to conduct a semiannual review of all expense accounts to determine the extent to which the payment of expenses benefited the Bank. Conclusions reached in these reviews must be in writing and a copy sent to the Deputy Comptroller. The written policy must at a minimum require:

(a) that all requests for reimbursement be supported by written vouchers, signed by the requesting party, and describing the nature of the business conducted, names of persons involved, the date, accomplishments of the meetings and benefit rendered to the Bank;

(b) that any submission for reimbursement include receipts for any expense in excess of ten ($10.00) dollars; and

(c) that any expense in an amount of two hundred ($200.00) dollars or more receive specific prior approval by the Board.

RD at 85-86; OCC Ex-2.

1. Alleged Violations and Factual Background

This Article, and Olive Report (an investigation report of the Bank's expenses prepared by CPA firm under the terms of Article XVIII, infra, at 55), were required in response to the Bank's previous history of expense account abuses by former Director Kramer and the questionable expense payments made to

Respondent Hedrick noted in the January 1984 examination.[3] RD at 87.

E&C acknowledges that the Bank developed written policies to improve control over expenses (E&C Brief at 61), but alleges that the Respondents violated this Article by failing to document properly and seek Board approval for expenses as required by the Consent Order. RD at 87. According to E&C, violations of Article XVI were identified at examinations from January 1985 through October 1987. The January 1985 examination revealed that expenses exceeding $10.00 were not always supported

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[3]Kramer resigned from the Board in October 1984 and later served time in a federal prison. Among other things, Kramer had stolen and forged two Bank cashier checks and presented them at another bank to pay off a $300,000 loan at that bank. Tr. Vol. VIII at 50, 52; RD at 7.

by a receipt, the benefit to the Bank was not consistently documented, and expenses exceeding $200.00 were not given Board approval prior to reimbursement. RD at 88; Tr. Vol. II at 97-100. The September 1985 examination revealed that the Bank was not requiring that all vouchers contain description of benefit to the Bank and accomplishments of meetings attended were not always documented in Bank records. RD at 88; Tr. Vol. III at 8-9. The September 1986 examination identified 36 expenses totaling $13,075 in which specific benefits to the Bank were not detailed, and $6,351 in travel expenses for 14 trips by Respondent Hedrick and Compliance Officer Halteman that did not receive prior Board approval. RD at 89; Tr. Vol. VI at 109-113; OCC Ex. 14 at 13. The October 1987 examination found

continued violation of the requirement of prior Board approval of expenses of $200.00 or more, specifically, expenses incurred by Hedrick and Halteman. RD at 90; Tr. Vol. VI at 172-175.

2. The Recommended Decision and Exceptions

The ALJ found Respondents in violation of Article XVI as evidenced by the four examinations from January 1985 to October 1987.

Respondents contend throughout the proceeding and in their exceptions that expenses for Halteman's trips would have received approval had it been sought but that approval was not required because he is not a director or executive officer covered by the Consent Order or the Notice of Assessment, that the intent of the Article was to address expense abuses of

directors no longer with the Bank, and that the violations do not constitute "significant" or "substantive" violations for which a CMP is warranted. R. Exceptions at 41-45. E&C did not except to the ALJ's findings.

3. The Comptroller's Decision

The Comptroller affirms the findings and conclusions of the ALJ that the Respondents violated Article XVI of the Consent Order.

With respect to Respondents' Exceptions concerning Halteman's expenses, the Comptroller agrees with the ALJ that Article XVI requires the "Board" to monitor expenses of "directors and officers", and the fact that Halteman is not a director is irrelevant. RD at 91. As the Bank's compliance officer, it is not disputed that Halteman is an "officer"

within the meaning of Article XVI and therefore among the employees whose expenses the Board was required to monitor. As the ALJ noted, whether approval of Halteman's expenses "would have been given" by the Board is also irrelevant, and the evidence clearly establishes that it was not sought.

Respondents assert that Article XVI was intended to address expense abuses of directors who are no longer with the bank. Even if this is true, it does not justify noncompliance with its terms. Respondents cannot unilaterally ignore the terms of the Consent Order.

The principal thrust of the Respondents' Exceptions is that the Board's failure to monitor the expenses of officers and directors is not sufficiently "serious" or "substantive" to warrant a

CMP. The Comptroller believes that the repeated violations cataloged by the examiners and affirmed by the ALJ negate the Respondents' argument. Moreover, the Bank was warned during the September 1985 examination about its noncompliance and President Eckel promised to correct it. RD at 88; Tr. Vol. III at 19. Nevertheless, at the October 1987 examination, it was determined that the Board was still in noncompliance. RD at 90. In the Comptroller's view, this is another example of the Respondents' protracted noncompliance with the Consent Order.

The Comptroller finds the Respondents in violation of Article XVI.

Article XVII

Article XVII of the Consent Order requires the Board to "adopt a written

comprehensive conflict of interest policy to be applicable to directors, principal shareholders, officers, and employees of the Bank." In addition to defining "conflict of interest," the policy must address specific items, including:

> (b) disclosure of actual and potential conflicts of interest to the Board, and periodic disclosure of "related interests" as defined by 12 C.F.R. Part 215; (and)
>
> (c) avoidance of conflicts of interest and the appearance of conflicts of interest, and of violations of fiduciary duty.

RD at 93-94; OCC Ex. 2.

Within 90 days, the Compliance Committee must conduct a review of the Bank's existing relationships with its directors, executive officers, affiliates, and principal shareholders and their related interests to ensure compliance with the policy. Thereafter, the Compliance

Committee must review all proposed transactions or modifications of existing relationships bring "any nonconforming relationships into conformity with the policy."

1. Alleged Violations and Factual Background

The Bank adopted a conflict of interest policy ("policy") on August 21, 1984, defining a conflict of interest as:

> ...any involvement, direct or indirect, by any bank affiliated person with any type of customer or servicing agent of the bank.

RD at 94; Tr. Vol. II at 107-108; OCC Ex. 3, Article XVII at 1.

The Bank's policy required all bank affiliated personnel to:

> fill out a Conflict of Interest Listing Form to be presented to the Board of Directors for review. This Conflict of Interest Form shall disclose current conflicts of interest that exist and potential conflicts that could arise in the future. Any bank member should avoid any conflict of

> interest or anything that would appear to be a conflict of interest. (Emphasis added.)

OCC Ex. 3, Article XVII at 1.

The Notice of Assessment alleges a violation of Article XVII because names had not been listed on disclosure forms to the Compliance Committee as potential conflicts of interest, and, therefore, the Committee review of insider relationships could not be effectively performed. RD at 94-95.

At the January 1985 examination, OCC's examiner determined that ont he basis of the Bank's definition of conflict of interest, Respondent Hedrick had failed to disclose seven actual or potential conflicts of interests for the Compliance Committee to review:

(1) Richard McCool - 1981, McCool, a bank debtor, had transferred his general partnership interest in Princeton Manor Associates to Hedrick. Income earned from this project was assigned to the bank and the Bank paid some of Hedrick's expenses for the project. Tr. Vol. VIII at 113.

(2) Sand Dunes Shores, Ltd. - Hedrick had a limited partnership interest and purchased time share weeks in Sand Dunes, a time-share project partly financed by the Bank., Tr Vol. VIII 102, 139. Premium Acceptance Corporation, of which Hedrick was an officer, was the original guarantor to the Bank in this transaction. Tr. Vol. II at 121. The Bank suffered losses of approximately $74,000 on this project. Tr. Vol. VIII at 141.

(3) Brown County Ski Mountain Resort - Hedrick was one of the originators of the

resort. He also guaranteed a loan to the resort at another national bank. The Bank took a 5% participation in the loan. Tr. Vol. II at 125. the project was in bankruptcy in 1985. Tr. Vol. VIII at 97. (4) William Rosenbaum - Rosenbaum was a stockholder in Brown County Ski Mountain Resort, Premium Acceptance Corporation and Sand Dunes Shores, Ltd., (Tr. Vol. II at 127). Hedrick was involved with each of these firms as an investor or officer. Rosenbaum also had several real estate loans from the Bank. Tr. Vol. IX at 162. (5) George Binder - Hedrick and Binder were guarantors in the work-out agreement on extensions of credit made by three financial institutions to the Sand Dunes Shores Ltd. project. Tr. Vol. II at 129. binder was also the on-site representative for Premium Acceptance Corporation and a

partner with Hedrick in Sand Dunes Shores, Ltd. Tr. Vol. VIII at 140; Tr. Vol. IX at 163.

(6) William Wright - Wright was an employee of one of Hedrick's businesses. the Olive Report indicates that the Bank had loaned Wright money to buy a car driven by Hedrick. Tr. Vol. II at 129.

(7) Phillip Schwab - Schwab, a director and principal shareholder of the Bank, had various business dealings with Hedrick. Tr. Vol. II at 130.

Further noncompliance with Article XVII was found at the September 1986 examination because the Bank had made certain insider loans which would not have been permitted had the Compliance Committee performed a proper review of insider relationships. Moreover, documents evidencing such reviews were not

maintained. This violation was discussed with the Bank's management. RD at 98-99; Tr. Vol. VI at 114.

2. The Recommended Decision and Exceptions

The ALJ found that regardless of whether the interests presented any actual conflicts of interest, the Respondents' failure to disclose and review names which could be potential conflicts constituted a violation of Article XVII. The ALJ noted, however, that the violation did not rise to the level of insider abuse, characterizing the Bank's technical noncompliance as a "seed which could flower into a more serious violation." RD at 100.

The Respondents except, arguing that there was no actual conflict of interest or personal gain, and that the Enforcement

& review Committee was given false information that there was actual insider abuse. R. Exceptions at 45-57.

E&C excepts to the ALJ's conclusion that the violation is "technical," contending that it did not intend to prove insider abuse but noncompliance with the terms of Article XVII. E&C Exceptions at 21-22.

3. The Comptroller's Decision

The Comptroller affirms the ALJ's finding of a violation of Article XVII but disagrees with his characterization that it was merely "technical."

The ALJ correctly noted that whether actual conflicts of interest existed is not the issue. The issue is whether the terms of Article XVII of the Consent Order was adhered to. The record shows that the Respondents' review of existing

relationships to determine conformity with the conflict of interest policy was ineffective because existing or potential conflicts of interest were not disclosed in writing to the Compliance Committee as required. The Respondents contend that because Hedrick had not personally brought some of the loans in question to the Bank, there could be no conflict of interest. Tr. Vol. VIII at 38. However, the Board's conflict of interest policy and definition of a conflict of interest make no such distinction. Moreover, Compliance committee minutes of August 5, 1985, indicate that when the Committee reviewed the directors' and officers' disclosure reports for the first time, they found an appearance of or actual conflict of interest between Hedrick and Brown County Ski Mountain Resort, Ltd., as well as Sand

Dunes Shore Resort, Ltd., and directed him to liquidate his related interests as soon as possible. Tr. Vol. V at 91; OCC Ex. 6.

As the ALJ noted, the conflict of interest policy adopted by the Bank's Board was intended to require disclosure of any potential conflict of interest, however remote, and a documented review of these interests. RD at 99. The Board failed to do either. The record shows the Respondents' disregard for compliance with the terms of Article XVII. For this reason, the Comptroller disagrees with the ALJ that the violation is merely "technical," and finds this a breach of an important aspect of the Consent Order.

Finally, there is no information in the record to dispute or confirm the

Respondents' Exception that the Enforcement & Review Committee received erroneous or misleading information of insider abuse by the Respondents.

Article XVIII

Article XVIII of the Consent Order requires the Bank to hire an independent outside counsel to investigate expenses paid by the Bank to any director, shareholder, or officer since January 1982, and to submit a report to the OCC and the Bank. In addition, within ten days of receiving the report, the Board was to consider and act upon all recommendations, and advise the Deputy Comptroller in writing of its proposed action.

1. Alleged Violations and Factual Background

The investigation and report were required because of the abuse of expense accounts by insiders which had been identified at prior examinations. E&C Brief at 70. The Bank retained the services of a CPA firm, the George S. Olive Company, to prepare the investigative report (hereinafter referred to as "Olive Report"). Among other matters, the Olive Report highlighted Respondent Hedrick's expenses and noted that he should repay $4,588 in expenses which he had charged the Bank. The Bank determined that, of this amount, Hedrick was to be paid $4,284 for uncompensated time spent on bank matters, leaving a balance of $304 which he was to reimburse the Bank. However, the Olive Report did not verify that he had spent such time on Bank matters. Tr. Vol. VIII at 23.

E&C alleges that the Board failed to send its written response to the Deputy Comptroller indicating what actions it intended to take in response to the Olive Report within ten days of its receipt as required by article XVIII. RD at 100-101.

The dates of receipt of the Olive Report were disputed throughout the proceeding. donald Davis, a partner at the Olive Company involved in preparation of the Olive Report, testified that a draft was sent to Kevin Blakely at the district office in October 1984., although the Olive Report was only partially completed at that time, Blakely had instructed that the draft be sent to him and he would determine whether the Olive Company should continue to work on it. Tr Vol. VIII at 10-11. Davis testified that, in March 1985, NBE Lyle

inquired about the status of the Olive Report and Davis replied that it had never been issued because he was awaiting Blakely's response and blakely had not yet responded. Tr. Vol. VIII at 12. Davis testified he sent a copy of the Olive Report to the Bank in March 1985 after being told by Lyle that Blakely had accepted the draft report as final. TR. Vol. VIII at 13-15. However, Davis also testified that he did not know whether a copy of the report had previously been sent to the Bank by another Olive Company employee. Tr. Vol. VIII at 18-19.

Respondent Eckel's testimony during the proceeding was conflicting as to when the Bank received the Olive Report. His sworn affidavit and testimony indicated various dates : January 1985 (OCCex-20; Tr.Vol. VII at 212); "sometime in February 1985"

(Tr. Vol VII at 125); and finally, March 23, 1985 (Tr. Vol. VII at 135-137). Eckel further testified that a Special Board Meeting was held April 2, 1985, to discuss the Olive Report, and that the Bank's response was "filed with the (district office) on April 9, 1985." Tr. Vol. VIII at 125, 215.

NBE Lyle testified that he was shown a copy of the Olive Report at the Bank during his January 1985 examination, and that the Bank had not submitted its response to the OCC. Tr. Vol. III at 58-68. Lyle also testified that he did not determine the specific date that the Bank had received the Olive Report, but that the cover letter to the Board attached to it was dated September 20, 1984. Tr. Vol. II at 137; Tr. Vol. III at 58-61.

2. The Recommended Decision and Exceptions

The ALJ found the evidence did not support a finding that the Respondents failed to send their response to the Olive Report within the required time frame. He noted that, despite Respondent Eckel's inconsistent testimony, E&C failed to "submit proof of when the Directors received the report, to allow any inference or conclusion that the response to the report was delinquent." RD at 103.

While the Respondents do not except to the ALJ's finding, they allege the OCC did not disclose that it had its possession the "receipt" for the Olive Report. R. Exceptions at 47-49.

E&C excepts to the ALJ's finding that it failed to sustain its burden of proof because the date the Olive Report was

received was not established. E&C alleges that even accepting Respondent Eckel's testimony that the Bank received the Olive Report on March 23, 1985, and mailed it on April 9, 1985, it was still a week late under the terms of the Consent Order. E&C Exceptions at 22-23.

4. The Comptroller's Decision

The Comptroller affirms the finding of the ALJ that the evidence does not support a finding that the Respondents did not submit their response within the required time period because E&C "failed to establish the dates with which we must be concerned." RD at 103.

The facts in the record concerning precisely when the Bank received the Olive Report, when it was sent to the OCC received the Bank's response are conflicting, and E&C did not prove by a

preponderance of the evidence the dates in question to resolve the issue in its favor. The record is replete with inconsistent statements regarding the dates in question. Although NBE Lyle testified that he was given a copy of the Olive Report at his January 1985 examination and the cover letter was dated September 20, 1984, he also testified that he did not commence his examination until February 1985, and concluded the examination March 26, 1985. Tr. Vol. VII at 128. Compliance Committee minutes from January 29, 1985, indicate that although the Bank had not yet received the Olive Report, it decided to review all expenses at the February meeting. R. Ex. 3B. A letter dated March 23, 1985, was sent to all Board members with a copy of the Olive Report, calling for Special Board meeting

to discuss it and to "develop specific recommendations in writing to the (OCC) as per (the Consent Order)." R.Ex. 30. Respondents mailed their response to the district office on April 9, 1985, according to a certified mail receipt. OCC Ex. 21.

Since NBE Lyle was in the Bank until the end of March 1985,and the Bank had promised to send its response to the OCC within thirty days, its dispatch of the response on April 9, 1985, is within the time frame. Although E&C is correct in asserting in its Exceptions that if the bank did not receive the Olive Report until March 23, 1985, mailing it on April 9, 1985, is beyond the requisite ten-day time period, the Comptroller finds that E&C failed to sustain its burden of proof on this issue during the hearing.

Finally, although E&C failed to show by a preponderance of the evidence when the Olive Report was sent to the Bank, when OCC accepted the Olive Report as "final" and when it received the Bank's response, there is no information in the record to dispute or confirm the Respondent's exception that E&C intentionally failed to disclose evidence of OCC's "receipt" of the Bank's report.

The Comptroller therefore believes the ALJ was correct in finding that because E&C failed to prove by a preponderance of the evidence when the Bank received the Olive Report, there is no basis upon which to find a violation of Article XVIII.

VIII. Amount of the Civil Money Penalty

The CMP authorized for a violation of a final order is "not more than $1,000

per day for each day during which the violation continues." The Comptroller may "in its discretion, compromise, modify, or remit the peanlty." 12 U.S.C. SEC. 1818 (i)(2)(i). Factors to be considered in determining the appropriate amount of th CMP assessment are:

> the size of financial resources and good faith of the insured bank or person charge, the gravity of the violation, the history or previous violations, and such other matters as justice may require.

12 U.S.C. SEC. 1818 (i)(2)(ii)

The Notice assessed a CMP of $15,000 against Respondent Hedrick and $10,000 against Respondents Abercrombie, Eckel, Calloway and Sloan. The ALJ recommended a CMP of $20,000 against Respondent Hedrick and $1,000 each against the other Respondents based upon their good faith efforts to "remedy deviation from the

elements agreed to in the cease and desist order..." RD at 127.

The Comptroller disagrees with the ALJ's recommendation of the amount of the CMPs. Whilke no precise count has been made of the aggregate number of days that the Respondents were in violation, the number exceeds 300 days just for Article III (requiring documentation for additional loans to criticized borrowers). Tr. Vol. I at 122-123; R. Ex. 4. For Article XII (requiring submission of budgets and operating assumptions), the violation extended from January 31, 1985, to at least April 2, 1985, a period of 61 days. At a rate of $1,000 per day for each violation, respondents sare potentially subject to CMPs aggregating hundreds of thousands of dollars.

The determintion of the appropriate CMPs in this case is based on an evaluation of the statutory factors identified above and the record in this proceeding. After giving careful consideration to the recommendation of the ALJ, and reviewing the entire record in light of the statutory factors, the Comptroller assesses Respondent Hedrick a CMP of $15,000, and $10,000 against Respondents Abercrombie, Eckel, Sloan, and Calloway, for the reasons set forth below.

A. Financial Resources

In June 1985, the OCC afforded the Board the opportunity to provide the district office with information relevant to the contemplated CMP action, including the financial resources of the members of the Board of Directors. OCC Ex. 24, RD at 121. In response, Respondent Eckel stated

that he receives and "adequate although modest salary," and that "any severe penalty would result in a financial hardship". OCC Ex. 23. Eckel did not submit a financial statement, and did not have one on file at the Bank. E&C Brief at 99; Rd at 121.

Respondent Sloan responded that he lives on a fixed income from social Security and a private retirement plan yielding approximately $14,000 annually. He also stated that as of the date of his response (July 1, 1985) his son had one more year in college. He claimed that any sizeable penalty would require him to liquidate assets. OCC Ex. 25. However, the ALJ noted that a financial statement dated June 30, 1987, incorporated into OCC Ex. 18, reveals a total net worth of

$250,250, with an income for the current year of $39,400. RD at 121-122.

Hedrick's response indicated he was the sole wage earner for a household of five and that any significant penalty would render a financial hardship. OCC Ex. 27. However, the ALJ noted a financial statement on file at the Bank dated May 1, 1987, revealed Hedrick's total net worth to be $1,896,800, and an annual income of $94,400. OCC Ex.. 18; RD at 122.

Abercrombie's response stated that his income and that of his wife consists entirely of Social Security benefits and interest on savings. OCC Ex. 36. However, the ALJ noted that his financial statement on file at the Bank dated August 30, 1984, revealed a net worht of $593,555, and an annual income of $63,086. RD at 122.

The evidence shows that Respondent Calloway had a net worth of more than $4 million when he became a director, but that he subsequently entered bankruptcy. Tr. Vol. VIII at 78; RD at 122.

The ALJ concluded that the financial resources of the Respondents "...appear to be adequate, [but] the good faith, gravity, and history of previous violations must be given great weight." RD at 127.

Respondents did not introduce evidence at the hearing to rebut the evidence concerning financial resources introduced by E&C. E&C Brief at 98. Therefore, the Comptroller concludes that the financial resources of the Respondents are sufficient to support the CMP assessment recommended by the ALJ. The Comptroller also believes that the

Respondents' financial resources are adequate to support a higher assessment.

B. Good Faith

Although good faith is not a defense to a civil money penalty, the statute requires the Comptroller to consider the good faith of the Respondents in determining the amount of the penalty. Fitzpatrick v. FDIC, 765 F.2d 569, 578 (6th Cir. 1985).

The ALJ's conclusion as to the Respondents' good faith is not entirely clear. He appears to harbor significant doubts about the Respondents' good faith even while giving them credit for certain actions. The ALJ notes that while the Respondents made notable progress in rehabilitating the Bank after its deterioration in the 1970's and after Mr. Kramer's resignation, "there remains the

problem of continuing violations of the [Consent Order]." Following a discussion of Respondents' common law duty to exercise ordinary care and reasonable oversight of the Bank's affairs, the ALJ concludes:

> As directors of the bank, the Respondents were under a duty to comply with the [Consent] Order; such compliance would have manifested an indicia [sic] of good faith. However, specific instances of good faith are noted in various portions of the [ALJ's decision].

RD at 123. The ALJ noted the Respondents' good faith in his discussion of Articles I and IX. RD at 26, 84.

Regardless of the interpretation of the ALJ's conclusion, the Comptroller finds the Respondents' good faith to be seriously deficient. The Respondents' compliance with the Consent Order has been intermittent and incomplete. A Consent

Order is not to be taken lightly. It demands vigorous compliance efforts, exceeding the normal oversight expected of a bank director. Yet, on numerous occasions through the examinations process, including supplemental letters to the Board accompanying the examination reprots, the Respondents were advised of deficiencies in the Bank's operations. OCC Exhibits 1, 4, and 7-9. Despite these warnings, the record demonstrates repetitive and continuing violations and a protracted disregard for the terms of the Consent Order. As early as October 1983, the Respondents were advised that noncompliance with the Consent Order would result in the assessment of CMP's. OCC Ex. 10. Nevertheless, despite the criticism set forth in the Januatry 1985 examination and the threat of CMPs, the

Respondents continued to ignore the requirements of the Consent Order. OCC Exhibits 4, 14, and 17. In certain instances, they not only failed to correct existing violations, they permitted them to continue and increase. For example, between the January 1985 and October 1987 examination. credit exceptions rose from approximately 10 to 20 percent. E&C Brief at 101; OCC Exhibits 1 and 17. The failure of the Respondents to heed the warnings and advice of the OCC's examiners and their continued pursuit of actions detrimental to the Bank evidence a lack of good faith effort to comply with the Consent Order.

The Comptroller acknowledges, as did the ALJ (RD at 127), some positive steps taken by the Respondents to improve the Bank's overall operations and ensure

compliance with the Consent Order, e.g., hiring Jay Halteman as a compliance officer and George Schramm as an "advisor." RD at 8 and 127. However, as the ALJ correctly noted, these steps were not enough to ensure that the Bank's operations satisfied the stringent requirements of the Consent Order. Rd at 127. The Comptroller therefore finds that these actions taken by the Respondents were not sufficient to offset the violations of the Consent Order.

C. Gravity of the Violations

The ALJ determined that the proven violations of the Consent Order were of "some degree of gravity, particularly in the area of the lending function of the Bank." However, the ALJ concluded that the gravity of noncompliance with the Consent Order, and, consequently, the

amount of penalties assessed, is mitigated by his findings that: (1) the violation of Article I was "cured" and acted upon immediately after the Respondents were told to submit 60-day reports; (2) there was no violation of Articles XII (requiring submission of budgets) and XVIII (requiring submission of the Bank's response to the Olive Report); and (3) there were "no actual conflicts of interest discovered or inquired into by [the OCC's] examiners." RD at 124-125.

For the reasons explained in the discussion of the Respondents' good faith, the Comptroller finds the Respondents' violations more serious than does the ALJ. The record demonstrates the Respondents failed to carry out diligently the lawful requirements of the Consent Order to which they had stipulated. Further, the

Comptroller has found violations or noncompliance with nine articles of the Consent Order, one more than the ALJ.

As majority shareholder and Chairman of the Board, Respondent Hedrick has a fiduciary duty to the Bank's shareholders and depositors. The record demonstrates that Hedrick's relationship with Sand Dunes Shores, Ltd., Brown Ski Mountain Resort, and the Richard McCool loan were of questionable benefit to the Bank and have resulted in loss to the Bank. The Comptroller agrees with the ALJ's conclusion that Hedrick's length of service with the Bank, his power to influence, prior violations, and financial resources justify imposing a higher CMP than the other Respondents. RD at 128. The Comptroller also believes a higher

amount is warranted in light of the serious nature of his violations.

D. History of Previous Violations

The Comptroller agrees with the ALJ that the Bank has demonstrated a long history of violations of the Consent Order, beginning with the findings from August 1983 examination, and continuing throughout the January and June examinations of 1984. RD at 125. The ALJ also found evidence of violations of law by the Respondents which, although "not the specific subject of the civil money penalty assessment,... bears upon [the Respondents'] previous history of violations." Id., note 30; OCC Ex. 4. The Comptroller agrees with the ALJ that "The previous violations of the [Consent] Order by Respondents serve to illustrate the necessity of meting a civil money

penalty, as well as to assist in our determination of the amount of that penalty." RD at 125.

E. Other Matters As Justice Requires

The ALJ found that justice requires a consideration of the findings of examinations in September 1985 and 1986 and October 1987, "as well as the noted progress of the Bank in certain area[s] and its profitability." RD at 125. The ALJ noted that despite the violations of the Consent Order discovered at these subsequent examinations, "...testimony elicited at the hearing revealed that from December 1984 through September 1985, there was always some margin of profitability, however minimal." RD at 125-126.

The Comptroller believes that the profitability of the Bank should be

accorded less weight than the ALJ gave it. Profitability, which the ALJ found to be "modest" in any event, RD at 123, is of little relevance when evaluating compliance with a Consent Order.

The statute provides that in determining the appropriate CMP, the Comptroller may consider "such other factors as justice may require." The Comptroller believes that an important factor is the Congressional intent that CMPs should serve as deterrents to violation of law, rules, regulations, and orders of the agencies. See H. Rep. No. 1383, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. Code Cong. and Ad. News 9273, 9289.

The Comptroller is of the opinion that such penalties should serve as deterrent, not only for the individuals

involved, but for the banking system as a whole. The mere fact that the Bank achieved some minimal margin of profitability, therefore, is irrelevant to determining the appropriate CMP in this case.

As the ALJ notes, Respondents owe the Bank the duty to exercise ordinary care and a reasonable amount of oversight and supervision of its affairs. RD at 123. This common law obligation is buttressed by the requirement, found in the original National Bank Act of 1864 and still in existence today, that each director "take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs" of the Bank. Act of June 3, 1864, ch. 106, 9, 13 Stat. 102 (codified as amended at 12 U.S.C. 73). See Bowerman v. Hamner, 250 U.S. 504, 508,

510 (1919). Respondents' repeated and continuous violations of the Consent Order demonstrate their failure to carry out their common law and statutory duties in the best interest of the Bank. Consequently, the Comptroller has decided to assess CMPs against the Respondents in an amount greater than that recommended by the ALJ.

IX. CONCLUSION

After a careful review of the entire record and the recommendations of the ALJ, The Comptroller finds that the Respondents have violated nine articles of the Consent Order. Accordingly, after consideration of the statutory factors, the Comptroller issues the attached final order of assessment against Respondent Hedrick in the amount of $15,000, and Respondents

Abercrombie, Eckel, Sloan, and Calloway in the amount of $10,000 each.

June 20, 1989 Robert L. Clarke
Date Comptroller of the Currency

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF)
DONALD E. HEDRICK, ET AL., DIRECTORS,)
AA-EC-85-120
RUSHVILLE NATIONAL BANK,)
RUSHVILLE, INDIANA)

ORDER

On October 25, 1985, the Enforcement and Compliance Division of the Office of the Comptroller of the Currency issued a Notice of Assessment of a Civil Money penalty pursuant to 12 U.S.C. SEC. 1818 (i)(2)(i) against the Respondents, Donald E. Hedrick, Manley Abercrombie, E. Weston Sloan, Richard F.Eckel, and Robert Q. Calloway, Directors of the Rushville

National Bank, Rushville,Indiana, for violations of ten articles of an Order to Cease and Desist and Amended Order to Cease and Desist (referred to collectively as "Consent Order") issued against the Bank on June 29, 1983, and June 19, 1984, respectively. The Notice of Assessment of a Civil Money Penalty was amended on December 5, 1985, and January 27, 1988. An administrative hearing was held on March 15-25, 1988, and June 21-22, 1988, before the Honorable David G. Oringer, Administrative Law Judge in Cincinnati, Ohio.

Based on the record of the hearing and the recommended decision of the Administrative Law Judge, the Comptroller finds that the Respondents have violated nine articles of the Consent Order.

Consequently, for the reasons set forth in the attached decision, it is hereby ORERED, that a civil money penalty be assessed against Respondent Hedrick in the amount of fifteen thousand dollars ($15,000) and Respondents Abercrombie, Eckel, Sloan and Calloway in the amount of ten thousand dollars ($10,000) each.

Remittance of this civil money penalty shall be payable to the Treasury of the United States and delivered to the Hearing Clerk, Office of the Chief Counsel, Comptroller of the Currency, Washington, D. C. 20219.

This ORDER shall become effective immediately after its service and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court, in

Comptroller or a reviewing court, in accordance with any applicable regulations.

June 20, 1989 ROBERT L. CLARKE
Date Comptroller of the Currency

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

(3)

No. 90-1626

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ET AL., PETITIONERS

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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(3)

QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency properly assessed civil penalties against petitioners for past violations of a cease-and-desist order.

2. Whether the Comptroller provided petitioners with adequate notice of his intention to assess civil penalties for violations of the cease-and-desist order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Abercrombie v. *Office of Comptroller of Currency*:	
641 F. Supp. 598 (S.D. Ind. 1986)	3
833 F.2d 672 (7th Cir. 1987)	4
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	5
Cutten v. *Wallace*:	
80 F.2d 140 (7th Cir. 1935)	6
298 U.S. 229 (1936)	6, 8
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947)	8
First Nat'l Bank of Lamarque v. *Smith*, 610 F.2d 1258 (5th Cir. 1980)	2
Groos Nat'l Bank v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978)	2
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987)	5, 7
Wisniewski v. *United States*, 353 U.S. 901 (1957)	8

Statutes:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:	
§ 309(d), 33 U.S.C. 1319(d)	7
§ 505(a), 33 U.S.C. 1365(a)	7

Statutes—Continued: Page

Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*:
12 U.S.C. 1818 (1988) 2, 4
12 U.S.C. 1818(b) (1988) 2
12 U.S.C. 1818(e) (1988) 2
12 U.S.C. 1818(i)(2) (1988) 2, 3, 8
12 U.S.C. 1818(i)(2)(i) (1988) 3, 4, 5, 6, 7, 8
12 U.S.C. 1818(i)(2)(iii) (1988) 3
12 U.S.C. 1821(c) (1988) 2
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 907(a), 103 Stat. 462-464 2
Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641:
§ 107(a)(1), 92 Stat. 3649-3650 2
§ 107(e)(1), 92 Stat. 3660 2
Grain Futures Act of 1922, ch. 369, 42 Stat. 998 7
§ 6(b), 42 Stat. 1002 8
12 U.S.C. 1 *et seq.* 2
12 U.S.C. 21 2
12 U.S.C. 93(b) 2
12 U.S.C. 191 2
12 U.S.C. 504 2
18 U.S.C. 471-513 6

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1626

MANLEY ABERCROMBIE, ET AL., PETITIONERS

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 920 F.2d 1351. The decision of the Comptroller of the Currency (Pet. Supp. App. 1-128) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1990, and a petition for rehearing was denied on January 23, 1991. The petition for writ of certiorari was filed on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comptroller of the Currency is responsible for supervising the affairs of national banks and ensuring the

safety and financial soundness of their operations. 12 U.S.C. 1 *et seq*. Congress has given the Comptroller broad statutory powers to carry out his duties, authorizing him to exercise extensive control over banks and their directors, officers and employees. See *First Nat'l Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980); *Groos Nat'l Bank* v. *Comptroller of the Currency*, 573 F.2d 889, 896 (5th Cir. 1978). Those powers include the authority to charter banks (12 U.S.C. 21); to declare banks insolvent (12 U.S.C. 191); to appoint a receiver to liquidate a bank's assets (12 U.S.C. 1821(c)); to suspend or remove a bank's directors and officers (12 U.S.C. 1818(e)); to issue cease-and-desist orders (12 U.S.C. 1818(b)); and, as is particularly relevant in this case, to impose civil penalties (12 U.S.C. 93(b), 504 and 1818(i)(2)).[1]

2. Petitioners are the directors of Rushville National Bank of Rushville, Indiana, a small, federally chartered bank that is regulated by the Comptroller. Beginning in 1978, the Comptroller discovered serious problems in the Bank's operations. In an effort to correct the Bank's deteriorating condition, the Comptroller and the Bank entered into a cease-and-desist order on June 29, 1983, and an amended cease-and-desist order on June 19, 1984 (collectively the Consent Order). The Consent Order con-

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[1] Congress first granted the Comptroller authority to issue cease-and-desist orders against individuals through the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA), Pub. L. No. 95-630, § 107(a)(1), 92 Stat. 3649-3650. The FIRA also empowered the Comptroller to assess civil penalties for violations of such orders. § 107(e)(1), 92 Stat. 3660. Congress has since amended Section 1818 to provide for larger daily civil penalties. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 907(a), 103 Stat. 462-464. Unless otherwise noted, all references herein to Section 1818 are to the previous version that was in effect during the events at issue in this case.

sisted of 16 articles that outlined the measures that the directors were to take to improve the safety and soundness of the Bank. Pet. App. 2, 5-6.

The Comptroller conducted an examination on January 31, 1985, and found violations of ten articles of the Consent Order. The Comptroller's letter transmitting the report of that examination warned the directors that they risked assessment of civil penalties. On June 21, 1985, the Comptroller wrote to each director notifying him that the Comptroller was considering whether to assess civil penalties against the individual directors for failing to comply with the Consent Order. On October 25, 1985, the Comptroller, acting pursuant to 12 U.S.C. 1818(i)(2), issued a Notice of Assessment of a Civil Money Penalty assessing a civil penalty of $15,000 against petitioner Hedrick, and civil penalties of $10,000 each against petitioners Abercrombie, Calloway, Eckel, and Sloan. Pet. App. 6-8.[2]

Petitioners requested an administrative hearing, see 12 U.S.C. 1818(i)(2)(iii), but moved for dismissal of the proceedings before a hearing could be held. They argued that: (1) the Comptroller lacked authority to impose personal liability against them without filing suit in district court; and (2) civil penalties could not be assessed administratively for past violations because the statute uses the present-tense verb "continues" in the penalty clause of 12 U.S.C. 1818(i)(2)(i), and thus requires that the violation be ongoing at the time the Notice is issued. The administrative law judge (ALJ) denied the motion. Petitioners then sought an injunction against the administrative proceedings in district court. See *Abercrombie* v. *Office of Comptroller of Currency*, 641 F. Supp. 598 (S.D. Ind. 1986). The district court

[2] The notice was amended on December 5, 1985, to correct technical and typographical errors. Like the court of appeals, we shall refer to the notices collectively as the "October 1985 Notice." Pet. App. 7 n.3.

dismissed the suit for lack of jurisdiction, and the Seventh Circuit affirmed. *Abercrombie* v. *Office of Comptroller of Currency*, 833 F.2d 672 (7th Cir. 1987). See Pet. App. 7-15.

The ALJ resumed the administrative proceedings, held a hearing, and issued a recommended decision and order on March 20, 1989. He rejected petitioners' argument that Section 1818 permitted civil money penalties only for continuing violations. He concluded that petitioners had violated eight of the ten articles of the Consent Order cited by the Comptroller in the Notice and recommended that the civil penalty assessments be reduced to $2,000 for petitioner Hedrick and $1,000 each for petitioners Abercrombie, Eckel, Calloway, and Sloan. Pet. App. 15-16.

The Comptroller issued a final decision on June 20, 1989, that adopted much of the ALJ's reasoning but imposed larger penalties. The Comptroller, like the ALJ, concluded that Section 1818(i)(2)(i) "authorizes the imposition of [civil penalties] for past, present, and continuing violations of a cease and desist order." Pet. Supp. App. 11. The Comptroller also agreed with the ALJ that Section 1818(i)(2)(i) does not require that violators of a cease-and-desist order be given time to cure their violations after a notice of assessment is issued, stating that "the Consent Order itself was adequate notice to [petitioners]." Pet. Supp. App. 17; see Pet. App. 16-18.

Turning to the specific allegations of the Notice, the Comptroller found petitioners in violation of nine of the ten articles charged, including two articles for which the ALJ had found no violation.[3] Although the Comptroller declined to impose the "hundreds of thousands of dollars" of civil penalties that petitioners potentially faced, Pet. Supp. App. 111, the Comptroller disagreed with the ALJ's finding that

[3] The Comptroller also found that violations of at least two articles of the Consent Order continued even after the October 1985 Notice. Pet. Supp. App. 31-32, 41.

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the assessments should be reduced because of evidence of petitioners' good faith. *Id.* at 116-117. On the contrary, the Comptroller found petitioners' "good faith to be seriously deficient" and found the violations to be "more serious" than had the ALJ. *Id.* at 117, 121. The Comptroller therefore set the assessment at $15,000 for petitioner Hedrick and $10,000 each for petitioners Abercrombie, Calloway, Eckel, and Sloan. *Id.* at 112. See Pet. App. 18-20.

3. The court of appeals affirmed the Comptroller's decision. Pet. App. 2. It specifically held "that the Comptroller had the legal authority to impose civil money penalties for actions occurring between the issuance of the cease and desist order and notice of assessment." *Id.* at 44-45. The court concluded that Section 1818(i)(2)(i) was ambiguous as to whether civil penalties may be imposed for "past" violations, but it ruled that the Comptroller's interpretation was "reasonable" in light of the Section's language, purpose, and legislative history. Pet. App. 24-34. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The court also concluded that petitioners had received adequate notice that they would be subject to civil penalties for failure to comply with the cease-and-desist order. Pet. App. 37-43.

ARGUMENT

1. Petitioners argue that the court of appeals erred in affirming the Comptroller's determination that 12 U.S.C. 1818(i)(2)(i) authorizes civil money penalties for past—as well as present and continuing—violations of cease-and-desist orders. Pet. 27-29. Petitioners principally contend that the Comptroller's construction is inconsistent with Section 1818(i)(2)(i)'s language and contrary to this Court's decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and the Seventh

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Circuit's decision in *Cutten* v. *Wallace*, 80 F.2d 140 (1935), aff'd, 298 U.S. 229 (1936). See Pet. 7-25. Those contentions are without merit.

Section 1818(i)(2)(i), as in effect at the time of petitioners' actions, provided:

> Any insured bank which violates or any * * * director * * * participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final * * * shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues. * * *

12 U.S.C. 1818(i)(2)(i). That provision—which states that a director "who violates" any order "shall forfeit and pay a civil penalty"—subjects a director who violates a cease-and-desist order to future assessment of civil penalties. Obviously, when the future becomes the present, what was the present becomes the past. Thus, Section 1818(i)(2)(i) authorizes the Comptroller to assess penalties for actions that—at the time he actually assesses the penalty—are "past" violations.[4]

Petitioners' reliance on this Court's decision in *Gwaltney* is misplaced. The issue in that case was whether citizen plaintiffs could commence an action for injunctive relief and civil

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[4] There is nothing novel in this reasoning. For example, most criminal statutes, which impose penalties for past violations, are phrased in similar terms. See, *e.g.*, 18 U.S.C. 471-513 (counterfeiting and forgery offenses). As the court of appeals explained, the Comptroller's interpretation is also consistent with the provision's deterrent objective and its legislative history. Pet. App. 25-37.

penalties under the citizen suit provisions of the Clean Water Act, which provide, in pertinent part, that:

> any citizen may commence a civil action on his own behalf—
>
> > (1) against any person * * * who is alleged to be in violation of (A) an effluent standard or limitation under this chapter * * *.

33 U.S.C. 1365(a). This Court concluded that the citizen could satisfy this requirement through "a good-faith allegation of ongoing violation." *Gwaltney*, 484 U.S. at 67. The Court's interpretation of the Clean Water Act's citizen suit provisions shed no light on the proper interpretation of the markedly different language of Section 1818(i)(2)(i). Rather, the Clean Water Act's civil penalty provisions are the appropriate source for comparison. The Clean Water Act provides, in language comparable to Section 1818(i)(2)(i), that

> any person who violates any [compliance] order issued by the Administrator * * * shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. 1319(d). The Court observed in *Gwaltney* that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." 484 U.S. at 58. Thus, the Court's decision in *Gwaltney* supports the Comptroller's interpretation of his authority here.

Petitioners' reliance on the Seventh Circuit's decision in *Cutten* is similarly misplaced. The issue in that case was whether the Secretary of Agriculture could suspend a commodity trader's privileges under the Grain Futures Act of 1922, ch. 369, 42 Stat. 998, based on regulatory violations that had occurred two years prior to the issuance of the com-

plaint. Section 6(b) of the Act provided, in relevant part, that

> If the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act * * * he may serve upon such person a complaint stating his charge in that respect * * *.

42 Stat. 1002. As this Court explained, the Seventh Circuit "held that the power conferred by § 6(b) is remedial, not punitive; that it is limited to suspending a trader * * * who is presently committing an offence." 298 U.S. at 236. That provision, which specifically gave the Secretary authority to issue a complaint concurrent with the finding of an ongoing violation, bears little similarity to Section 1818(i)(2)(i), which subjects a present violator of a cease-and-desist order to future penalties. Hence, the Seventh Circuit's decisions in *Cutten* and this case are not inconsistent.[5]

2. Petitioners also contend that the court of appeals erred in holding that they had received constitutionally adequate notice that they would be subject to civil penalties. Pet. 30. See also Pet. 25-27. As the Comptroller explained, the cease-and-desist order itself amply informed petitioners that they were obligated to cease their violations, and Section 1818(i)(2) set forth the consequences of their failure to do so. See Pet. App. 17. Petitioners, who are voluntarily engaged in a pervasively regulated industry, are expected to understand their legal obligations. Cf. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947). Additionally, the Comptroller gave petitioners repeated warnings, prior to issuance of the October 1985 Notice, that their actions would result in imposition of civil penalties.

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[5] In any event, a conflict between those decisions would present, at most, an intra-circuit disagreement that would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Pet. App. 38-39. As the Seventh Circuit explained, the Comptroller did not "lull" petitioners "into a false sense of security." *Id.* at 39. The October 1985 Notice and subsequent amendments gave petitioners clear notice of the charges, and petitioners had ample opportunity to present their defenses in the administrative and judicial proceedings. Thus, there was no lack of due process in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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